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In the
Supreme Court of the United States

OCTOBER TERM, 1964

NEW YORK STOCK EXCHANGE,
Petitioner

v.

WILLIAM H. LEGATE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The New York Stock Exchange petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the First Circuit in its opinion entered July 13, 1964 (Rehearing denied August 5, 1964), which reversed an order of the District Court dismissing a petition filed by the respondent in the equity receivership of his insolvent firm seeking direct relief against the Exchange.

OPINIONS BELOW

The opinion of the Court of Appeals(Appendix A *infra*, (1a-9a) is reported in 334 F. 2d. 704. The portion of which review is now sought appears in Appendix A, pages 7a to 9a (334 F. 2d 708-9). The Memorandum of Decision by the District Court is reported in 204 F. Supp. 944, the portion involved in this review is on page 946, in the Record

Appendix on page 71, and as Appendix B *infra*, pp. 1b to 5b. The Circuit Court's action on a petition for rehearing appears in Appendix C, *infra*, p. 1c.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on August 5, 1964 on denial of rehearing (Appendix C, *infra*, p. 1c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Can this Petitioner, a voluntary unincorporated association with no office or place of business in the District of Massachusetts, be made to respond there to an entirely personal tort claim of a limited partner (respondent) in a brokerage firm there in receivership, not related to the receivership of the insolvent firm, the disposition of which will not at all effect the fully administered receivership estate and filed in the equity receivership proceedings after the effective date of a bar order, on the basis only of notice to the Petitioner's local attorney, without service of any process upon it and against timely objection?

LAWS AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V —

No person shall be held . . . nor deprived of life, liberty, or property, without due process of law; . . .

RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Effective September 16, 1938, as amended

. . . . . .

Rule 3. Commencement of Action. A civil action is commenced by filing a complaint with the court.

Rule 4. Process.

(a) . . . . . .

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: . . .

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. . . .

Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pend-

ing action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) COUNTERCLAIM AGAINST THE UNITED STATES. . . .

(e) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. . . .

(f) OMITTED COUNTERCLAIM. . . .

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) ADDITIONAL PARTIES MAY BE BROUGHT IN. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall

order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. . . .

Rule 14. Third-Party Practice.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for

its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

STATEMENT OF FACTS

The proceeding in which Respondent filed his petition started with a Complaint by the Securities and Exchange Commission to enjoin the firm of duPont, Homsey & Company from business because of various violations of the Securities Exchange Act of 1934 (15 U.S.C. 780(c)(1), 78j(b), 78h(c) and 78h(d); R. 259), brought to its attention by customers of the firm and the Petitioner here, the New York Stock Exchange. A Receiver was appointed on the filing of the Complaint, September 17, 1960 (R. 266).

The firm had over 1,300 customer creditors and was thoroughly insolvent as a result of speculations and unauthorized or illegal transactions by the senior managing partner, Anton E. Homsey, who was a member of the Exchange.

During the fall of 1960 in order to procure funds so that public customer creditors could be paid, the Receiver developed his Plan for Partial Liquidation (R. 11 to 37), which was based upon a commitment (R. 12, 13) of the Exchange as a volunteer[1] to purchase for face value claims of certain large defrauded customers, "Special Claimants" (R. 14-16).

Under the Plan, which was duly approved by the District Court (R. 37), the Exchange made escrow deposits of funds

[1] See *Raldiris v. Simmons*, 242 App. Div. 603; 271 NYS 1018, aff'd 255 N.Y. 577; 195 N.E. 208, (1935) where on a petition very similar to that filed by the respondent here, the New York Courts denied relief against the Exchange.

with a Boston bank which were used to pay these creditors in full, all but one before December 31, 1960 and that one on May 5, 1961. These customer creditors assigned their claims to the Exchange's local attorney as its Nominee and in due course all other creditors were paid in full by the Receiver. Nothing has been paid on the assigned customer claims of the Special Claimants aggregating $498,998.88 (R. 54). In order to avoid a possible claim of preference these customers under the Plan executed a Consent, Waiver and Subordination (Exh. C to the Plan, R. 33) postponing any collection by the Assignee from the receivership estate until all customers and creditors of the firm were paid. The Exchange never had, nor did it ever make, otherwise than as assignee of customer-creditors a claim or counterclaim against the Receiver or the estate. The Nominee, as envisaged by the Receiver's Plan (R. 20), on July 5, 1961 filed a claim as Assignee of the "Special Claimants" for the uncontested amounts due them. (R. 54)

The Exchange's attorney and Nominee assisted the Receiver without charge to the estate in collecting some assets, representing the Receiver with Court approval in four particular areas, which resulted in the collection of $218,000 (R. 208, line 12; R. 209, lines 33 and 38; R. 210, line 11). Were it not for these collections there would have been no funds of the estate on the Receiver's discharge, for the remaining free balance of assets is now only cash of $98,294.58 held subject to order of the District Court. (R. 227)

The Exchange also provided the Receiver with additional funds under commitment letters dated November 10 and December 20, 1960, approved by the District Judge (Appendix D and D-1, *infra* pp. 1d to 7d) under which it paid the Receiver an aggregate of $215,000 (R. 85, 86).

The respondent became a limited partner in the firm in early 1959 at about the same time another limited partner

(Hennessey) was admitted, to make a total of four limited partners and two general partners.

The respondent filed a claim in the receivership on December 14, 1960 (R. 38 et seq.) one day before the expiration of the December 15 time limit fixed for filing claims in a Bar Order entered November 15 (R. 5, 36) when the Receiver's Plan was approved by the Court. This claim was for return of his limited capital contribution on the basis of rescission because of fraud by Mr. Homsey in inducing him to contribute. It also included a further claim by the respondent as a customer of the firm. These claims were litigated in extensive hearings before a Master (His Report appears on pages 105 to 144 of the Record) and denied by the District Court, which confirmed the Master's Report with some changes (R. 182). The Circuit Court affirmed except as to one item of the customer claim, which after allowed counterclaims set up by the Receiver (R. 90) showed the respondent owed $9,034.14. This was paid by liquidation of securities held by the Receiver (R. 228) leaving a balance due respondent, including Circuit Court costs, of $6,288.97 which has been paid. Respondent has no further claim of any kind against the receivership assets, and the Receiver has been discharged (R. 227).

On October 27, 1961, ten months after both the time when he filed his claim in the receivership and the effective date of the Bar Order, respondent filed his special petition (R. 58-64) praying on the basis of entirely new allegations that the Exchange be ordered to pay his claim for the return of his capital (R. 64). No process was ever applied for or issued by the Court (R. 71) His claim against the Receiver on different grounds was for this same capital contribution, and it was denied as above noted. This new petition of respondent was dismissed by the District Judge on jurisdictional and other grounds by his decison of May 1, 1962 (R. 71) (Appendix B, *infra*, p. 46), but this action was

reversed by the Circuit Court (Appendix A, *infra*, pp. 8a, 9a). The District Judge (R. 71, 72) ruled that this petition was an independent personal claim of respondent extraneous to the receivership which would hinder administration of the estate.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' holding of jurisdiction over Petitioner without any service of process is contrary to the Due Process guaranteed by the Fifth Amendment to the Constitution.

The Court of Appeals' opinion ignores the lack of service of process and asserts *in personam* jurisdiction on the basis of unspecified "normal consequences" of the filing of a claim which are not provided for by either the Rules of Civil Procedure or established practice.

As an extension of summary jurisdiction on the basis of implied consent and without process it is contrary to the Federal Rules of Civil Procedure and in conflict with recent decisions of other Courts of Appeals, particularly *Katchen* v. *Landry*, decided September 9, 1964 (C.A. 10) No. 7843; 2 CCH Bankruptcy Law Reports, New Developments, ¶ 61179, pp. 69713, 69715 and 69718 and *Elkins* v. *First National Bank*, 43 F. 2d 777 (C.A. 4 1930).

SUMMARY OF ARGUMENT

Actions for relief of any kind must be instituted by service of process as provided by statute and Court Rules except where the Rules permit counter-claims or cross-claims, not here applicable. Notice to a local attorney is not such process, and relief cannot be given unless there is jurisdiction over the defendant in the court from which process issues.

In the case of this non-resident voluntary unincorporated association, which cannot be sued in its own name under Massachusetts law, there was no jurisdiction in the District Court of Massachusetts, because the Exchange had no office in that District and did no business there. The activities of the Exchange's local counsel in assisting as counsel a local Receiver are not sufficient basis to say the Exchange was here for the purpose of personal jurisdiction of it. The Receiver is a different entity from the Exchange and cannot be regarded as its agent.

Respondent's petition if regarded as a counter-claim, cross-claim or third party complaint is not cognizable under Rules 13 or 14 of the Rules of Civil Procedure. Nor can jurisdiction over the Exchange rest on a theory of implied consent. The only authority relied on by the Court of Appeals, is inapplicable.

It is contrary to the decisions of this Court, in conflict with decisions of other Courts of Appeals and a violation of Amendment V to the Constitution, to stretch, as has been done below, the principles of summary jurisdiction to cover a claim in an equity receivership by a limited partner of the firm in receivership, not against the firm but directly against a third party, the Exchange, which did not have and never asserted in its own right a claim against the receivership estate but was interested only, after all creditors were paid, in uncontested claims of defrauded customers of the firm which it had purchased for full value with Court approval.

I. LITIGATION IS NOT TO BE COMMENCED WITHOUT SERVICE OF PROCESS IN ACCORDANCE WITH PRESCRIBED RULES, AND NONE WAS EVER MADE ON THE PETITIONER.

Supplementing the constitutional, statutory and common-law requirements for the adjudication of cases or contro-

versies, the Federal Rules of Civil Procedure provide the normal course for beginning, conducting and determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a civil nature with certain inapplicable exceptions stated in Rule 81.[2] Rule 2 directs that there shall be one form of civil action, Rule 3 provides an action is commenced by filing a Complaint, and Rule 4 provides for process and its service.

No process of any kind issued on respondent's Petition of October 27, 1961. There was not even an order to show cause, much less a summons. The only notice given the Petitioner here was a copy of the petition mailed by respondent's attorney to Petitioner's local attorney.

This is not due process or at all in accordance with established procedures (see Rule 4d(3) of the Rules of Civil Procedure), even where the person against whom relief is sought is clearly subject to the jurisdiction of the court, which this petitioner was not.

Service under Rule 4(d)(3) and 4(a) upon an unincorporated association which is subject to suit under its common name is made only by a marshal by delivering a copy to an officer, manger or general agent or one authorized by appointment or by law to receive it. No such service was even attempted here. No order or subpoena was even asked for.[3]

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[2] While proceedings in bankruptcy are so excepted by Rule 81(a), this exception does not apply to this Civil Action cognizable in equity. Bankruptcy General Order No. 37 even makes the Rules of Civil Procedure not inconsistent with the Bankruptcy Act applicable to bankruptcy cases.

[3] The other provision for service of process in Rule 4(e) is of no avail, because no attempt was made to serve under such a statute as is there described. And as a voluntary association the Petitioner in Massachusetts can only be sued by service on one of the "trustees", *Tyler* v. *Boot and Shoe Workers Union* 285 Mass. 54 (1933); *Canton* v. *Reuther* 341 Mass. 547 (1960); Mass. Gen. Laws Ch. 182 Sec. 6.

Since service in a Federal District Court is dependent on conformance with the Federal Rules, Constitutional questions of *in personam* jurisdiction are not often raised in Federal Court cases (except possibly to review service under a state statute pursuant to Rule 4(e) under the Fourteenth Amendment). In this case, however, respondent has sought to commence a new action outside the Rules of Civil Procedure. While it is vigorously asserted elsewhere in this Petition that this may not be done, nevertheless, even if it could be done, it is clear that such commencement without *in personam* jurisdiction must conflict with the due process clause of the Fifth Amendment to the Constitution.

The Court of Appeals holding of jurisdiction and adequate service is based upon a claim the Exchange was "here" and does not mention the absence of proper process service.

This holding is quite contrary to your decision in *New Hampshire Fire Insurance Co.* v. *Scanlon*, 362 U.S. 404, (1960) where in affirming a denial of jurisdiction by lower courts, it was said on pages 406, 407 and 408:

> "Such summary trials, it has been said, were practically unknown to the English common law and it may be added that they have had little acceptance in this country. In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law. Especially when a controversy like this is begun by peremptory seizure without an initial determination of the taxpayer's liability, there is neither justification nor authority for carving out an exception to the uniform and regular civil procedure laid down by the Federal Rules, either for the benefit of the party from whom the property was seized or for any other claimant."

While that New Hampshire Fire Insurance case involved a seizure of property by a Director of Internal Revenue,

the principle of it is even more applicable here in connection with a strictly civil matter between citizens.

Analogy to Bankruptcy proceedings does not help respondent because Section 2a of the Bankruptcy Act (11 U.S.C. 11) invests courts of bankruptcy with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under the Act but only "within their respective territorial limits as now established or as they may be hereafter changed." This section, together with the Federal Rule of Civil Procedure 4(f) prevents a court of bankruptcy sitting in bankruptcy from issuing process against persons not present in the territorial limits of the state in which the court sits. 1 *Collier on Bankruptcy*, 14th Ed. page 176 *et seq.*

As noted above, no service of any kind was attempted directly on the Exchange either here or in New York where it does business. The notice to its attorney cannot be effective, as he was attorney or Nominee for a limited purpose and not a general agent of the Exchange upon whom service could be made.

Any effort to sustain jurisdiction over the Petitioner on the basis that the respondent's petition is a counterclaim, cross-claim or third-party complaint under either Rule 13 or 14 of the Rules of Civil Procedure is equally ineffective. The original parties to this proceeding were the Securities and Exchange Commission and the insolvent firm. The receiver of course became a party and so did creditors, including both the respondent and the Petitioner's nominee. The "opposing party", both as to the Petitioner and the respondent, was the receiver. At most, the Petitioner through its nominee and the respondent can be regarded only as co-parties if indeed two claimants in a receivership can be called co-parties when their respective claims are utterly unrelated.

Under Rule 13(a) a compulsory counterclaim must arise out of the transaction or occurrence which is the subject matter of the opposing party's claim. If the respondent's petition of October 27, 1961 is to be considered as a counter or cross claim, the opposing party must be the Petitioner here, but there never has been any claim of any kind against the respondent by that opposing party and respondent's claims against Petitioner in his petition are unrelated to any other claims in the receivership proceeding.

Under Rule 13(b) where the counterclaim does not have to arise from the same transaction or occurrence that is the subject matter of the opposing party's claim, the same result is reached, because the opposing party, the Petitioner here, never made or had a claim against the respondent. The only claim the Petitioner has is an assignee of creditors against the estate. It follows that the respondent's petition cannot fit either Rule 13(a) or 13(b).

No more does Rule 13(g) covering cross-claims against a co-party support the respondent's claim of jurisdiction over the Petitioner because the respondent's petition of October 27, 1961 does not as required by Rule 13(g) arise out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Respondent's petition on the contrary alleges a separate personal tort extraneous to any matter involved in this proceeding or the claims of Petitioner or respondent against the estate.

Rule 13(h) supports this conclusion with its clear provision that the bringing in or parties other than those to the original action shall be as provided in the Rules, i.e., by a summons served if jurisdiction can be obtained.

Rule 14 is equally clear that a third-party in this case either the nominee or the Exchange itself must be brought in by summons and claimant. And further that third-party Rule 14 is limited to situations where the third party "is or may be liable" to the respondent here "for all or part of receiver's claim against him". This has never been suggested.

Any effort to bring respondent's petition of October 27, 1961 filed in the receivership case within the language of Rules 13 or 14, or even Sec. 68a of the Bankruptcy Act fails, because the Petitioner in the receivership proceedings could not possibly be regarded as an "opposing party" to respondent. It neither had nor made any claim against respondent. Petitioner and respondent were on the same side with the same interests, i.e., to collect and raise enough money to satisfy the customer creditors of respondent's firm.

It necessarily follows that jurisdiction of the Petitioner can not be supported under Federal Rules of Civil Procedure.

Invest-Import v. *Seaboard Surety Co.*, 18 FRD 499 D.C.N.Y. 1955), pointing out that the Rule 13 does not permit assertion of counterclaims against strangers to the litigation.

Higgins v. *Shenango Pottery Co.*, 99 F. Supp. 522 (D.C. Pa. 1931), pointing out a counterclaim can only be filed against an opposing party in the same capacity in which he sued.

Reynolds Pen Co. v. *Marshall Field Co.*, 8 FRD 314 (D.C. Ill. 1948), holding that these Rules have not relaxed the principles that a counterclaim cannot include issues not in dispute between the original parties or in which one of the original parties has no interest.

Any exception to the foregoing in cases of set-off of mutual debts does not apply here, as there were between re-

spondent and Petitioner no "mutual debts or mutual credits," the terms used to define set-off in Sec. 68a of the Bankruptcy Act (11 U.S.C. §108a).

Civil disputes can only be commenced in accordance with the Federal Rules, and there is no basis whatever in this case to invoke a doctrine of summary jurisdiction duly objected to where the respondent had ample opportunity to commence a plenary suit by proper process.

The Court of Appeals' holding of jurisdiction should be reversed and the action of the District Judge in dismissing respondent's petition reinstated.

II. THE ACTIVITIES OF THE EXCHANGE'S LOCAL COUNSEL UNDER THE COURT-APPROVED PLAN AND HIS ACTING ALSO FOR THE RECEIVER WITH COURT APPROVAL AND WITHOUT COMPENSATION FROM THE RECEIVERSHIP DID NOT MAKE THE EXCHANGE PRESENT IN MASSACHUSETTS FOR PURPOSES OF PERSONAL JURISDICTION.

The lack of proper process served on the Petitioner is no less an underlying error in the Court of Appeals' holding than the facts that the Petitioner was not at the time of the notice to its local attorney (October 27, 1961, R. 68) engaging in any activity in the Court's jurisdiction to make it present here for service of process, or any other purpose.

Hanson v. *Denckla,* 357 U.S. 235 at 251 (1938), which held a Florida court could not obtain personal jurisdiction over a Delaware Trust Company with not office or place of business in Florida but which administered a trust for the benefit of a Florida resident who had control over the trust assets. See Appendix E, *infra,* p. 1e)

Wyshak v. *Anaconda Copper Mining Co.* 328 Mass. 219 (1942).

The decisions which hold valid service of process on non-resident entities all involve local business activities of a continuing regular nature, including a local office or physical presence of a business representative. These basic elements to presence in a district do not exist in the case at bar.

It cannot be, because a non-resident engages a local attorney who subsequently acts for a local party, the Receiver, that the non-resident is therefore subject generally to personal jurisdiction.

This conclusion is not affected by the fact the attorney as Assignee of uncontested claims under a Court-approved Plan filed proof in the receivership proceeding for the ultimate benefit of the non-resident. The opposite result would reach the unjust result that the non-resident could not collect on uncontested claims which it purchased for full value with Court approval. The presence of an *inter vivos* trustee not served (the Nominee) cannot give a court personal jurisdiction over a non-resident beneficiary, the Exchange.

The Exchange was never doing business in the Massachusetts District sufficient to sustain personal jurisdiction at the time of the notice in October, 1961.

Byre v. *American Foreign Insurance Association* 3 F.R.D. 1 (D.C. Mass. 1943)

Demarkles v. *Rudolph Wurlitzer Co.* 132 F. Supp. 20 (D.C. Mass. 1955)

Wyshak v. *Anaconda Copper Mining Co., supra.*

The Exchange's activities in depositing the escrow funds and holding the escrow hearings required under the Plan were all finished in early 1961. If such could have been "doing business," they had ceased before respondent filed his petition and were unrelated to it.

The Petitioner's activities here in connection with the Receiver's Plan are identical with what a bank or other financing institution would have engaged in if it were making a collateral loan to the receivership. It is inconceivable that such activities could make the financier subject to service of process.

No more can the acts of the Petitioner's Nominee, including his petition in accordance with the Plan to realize on the assigned claims, make the Petitioner subject to service here, as it is indisputable that the Nominee or agent or other financing institution in the above example could enforce any collateral (the Special Claimants' assignments) which it took on the loan. As counsel to the receiver the Nominee was collecting assets for the estate, not the Exchange, and even though the Exchange might have an interest as the owner of uncontested claims, that can hardly make it doing business in Massachusetts.

The bringing of an action in a state where the claimant is otherwise not doing business is not an act which renders the claimant subject to *in personam* jurisdiction on other matters.

Sioux Remedy Co. v. *Cope*, 235 U.S. 197 at 205 (1914)

Accord: *Remington Arms Co.* v. *Lechmere Tire & Sales Co.* 339 Mass. 131 (1959), where at page 139 it was said:

> "Resort to the courts is not to be regarded as intrastate business."

The Court of Appeals appears (*infra*, p. 8a) to base its holding on a theory that the Receiver in pressing his counterclaim against the respondent was acting as an agent of the Exchange. The phrase "through a receiver prosecute claims against appellant", the respondent here, (*infra*, p. 8a) suggests that the Receiver's counterclaims

(R. 90) were really claims of the Exchange, but a glance at them will show this cannot be so. The Exchange itself could never have a claim for unauthorized capital withdrawals, money owed the firm, or damages to it. Although every claim made by a receiver or trustee in bankruptcy will, if successful, inure to the benefit of the debtor's creditors, that does not make the receiver a creditor's agent, and it has never before been suggested that one, against whom the receiver or trustee has asserted a counter-claim, can get affirmative relief against another creditor on a personal claim based on facts outside the receivership proceeding.

Lack of any factual basis for holding that the Petitioner was engaging in business in the First Circuit sufficient to sustain personal jurisdiction requires reversal of the Circuit Court's opinion.

III. IT IS CONTRARY TO THE CONSTITUTION, TO APPLICABLE DECISIONS OF THIS COURT AND TO DECISIONS IN OTHER CIRCUITS TO EXTEND THE PRINCIPLES OF SUMMARY JURISDICTION IN CERTAIN AREAS TO THIS PERSONAL TORT CLAIM OF A PARTNER IN AN INSOLVENT FIRM IN RECEIVERSHIP AGAINST THE NON-RESIDENT EXCHANGE.

There are no provisions of law or in the Federal Rules of Civil Procedure relating to equity receiverships similar to the Bankruptcy Act provisions for summary jurisdiction (Secs. 2a, 2a(7), 67a(4) and f(4); 11 U.S.C. §§11a, 11a(7), 107a(4) and f(4)), and yet the Court of Appeals seems *sub silencio* to have treated this proceeding as if it were in bankruptcy.

The statutory summary jurisdiction of the Bankruptcy Court has never been stretched to include a personal claim

by one creditor, on different grounds from his own claim in the bankruptcy, against the non-resident beneficial owner of other disputed claims. This summary bankruptcy jurisdiction over claims of creditors is limited to claims by and against the estate. It does not cover claims based on new and different facts between creditors. It is even limited by seasonable objection in some instances. 11 U.S.C. 11a(7)

"Summary jurisdiction of any kind is not to be extended."

New Hampshire Fire Ins. Co. v. *Scanlon*, 362 U.S. 404, 407, *supra*

O'Dell v. *United States*, 326 F. 2d 451 (C.A. 10 1964), where at page 455 it was said:

". . . a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant. Resort must be had to a plenary suit in such circumstances (citations omitted). Likewise, a court of bankruptcy *is without jurisdiction of a controversy solely and exclusively between third parties which does not involve directly or indirectly the bankrupt or his property.*" [emphasis supplied][4]

Katchen v. *Landry*, C.A. 10, No. 7843, decided September 9, 1964; 2 CCH Bankruptcy Law Reports, New Developments, ¶61719, pp. 69715, 69718, *supra*, where the Tenth Circuit Court sitting *en banc* decided unanimously that a trustee in bankruptcy could not counterclaim against a

[4] The exception to this rule in cases where it is impossible to administer the bankrupt estate without determining the controversy clearly has no application here, inasmuch as the estate in this case *has in fact* been administered completely, including respondent's claim against it. For other cases supporting the general rule stated in the *O'Dell* case, see *In re Hollywood Premiere*, 228 F. 2d 492 (C.A. 9 1955); *Reconstruction Finance Corp.* v. *Riverview State Bank*, 217 F 2d 455, 458 (C.A. 10 1954); *Central States Corp.* v. *Luther*, 215 F. 2d 38 (C.A. 10 1954), *cert. denied*, 348 U.S. 951; and *Evarts* v. *Eloy Gin Corp.*, 204 F. 2d 712 (C.A. 9 1953), *cert. denied*, 346 U.S. 876.

proof-filing creditor on an unpaid subscription to the debtor's stock but must file a plenary suit. Of the eight judges there were no dissenters on this point, although three judges dissented on the question of summary jurisdiction over other counterclaims e.g. the trustee involving preferences.

This is quite in line with *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (C.A. 5 1951), cert. denied, 342 U.S. 945; and *Peters* v. *Lines*, 275 F. 2d 919 (C.A. 9 1960); and *Coffman* v. *Cobra Mfg. Co.* 214 F. 2d. 489 (C.A. 9 1954), all holding that permissive counter-claims concerning transactions different from the claim can not be the subject of summary jurisdiction over timely objection.

If in a bankruptcy proceeding where summary jurisdiction exists by statute, the trustee cannot use it effectively on certain claims, it is an *a fortiori* proposition that one creditor in a civil receivership action cannot without plenary process claim against another creditor for a personal tort based on allegations outside the receivership.

It really is quite elementary that, even in bankruptcy, when a creditor of a bankrupt (respondent here) files a claim against the estate, the Court by implied consent has summary jurisdiction of counterclaims of the receiver or trustee against the claimant but *not* over claims by him against other creditors which require plenary process.

Collier on Bankruptcy, 14th Ed., §23.08, pp. 550, 554, 556

In the case at bar the claim to which this summary jurisdiction is extended by the Court of Appeals' opinion was not against the receivership estate. It was solely a personal claim directly against a third party, the Exchange, entirely extraneous from anything to do with liquidation of the estate. The District Court so held (R. 71).

Nor can it be argued that the respondent's petition is in the nature of a bill to reach and apply or an *in rem* pro-

ceeding against a fund located here (the remainder of the receivership estate's assets), because that kind of a proceeding must itself be commenced by a court process of some kind.

The only possible basis for the Court's opinion is the fiction of implied consent to jurisdiction and service. Timely objection was made (R. 65) to the attempted invalid service. As shown above, activities of the Petitioner and its Nominee in financing the Receiver's Plan cannot possibly be the basis for saying it impliedly consented to suit by respondent on an unrelated personal tort. This novel overextension of the concept of summary jurisdiction which exists only by statute or rule of Court in certain cases is unwarranted by the facts at bar and contrary to Amendment V to the Constitution as not "Due Process".

The only authority relied on by the Court of Appeals for this extension of jurisdiction without process is *Alexander* v. *Hillman*, 296 U.S. 222, decided in 1935 under the old equity rules which were replaced by the present Rules of Civil Procedure effective September 16, 1938 (308 U.S. 645).

That case is no proper precedent for the Court of Appeals' ruling. There claimants, non-residents of the District of West Virginia where a corporation was in receivership, sought a share of the estate's assets on a claim against the insolvent, and Your Honours naturally held that such claimants were subject to counterclaim by the receiver for misappropriation of corporat assets by the claimants. It was a case of mutual cross-claims.

Nothing like this exists at bar. The respondent's petition here had no relation to the receivership estate or assets. It is a separate personal claim on new facts against a third party, the Petitioner, whose interest was only in uncon-

tested claims of defrauded customers for which it had paid full value with Court approval.

One other case relied on in respondent's brief to the Court of Appeals, *Merchants Heat & Light Co.* v. *James B. Clow & Sons,* 204 U.S. 286 (1907), is no more applicable at bar than the *Hillman* case for reasons given above and particularly because the jurisdiction without process over the non-resident plaintiff in error, original defendant in the case, rested entirely upon *Merchants* having filed in its own right an answer in recoupment seeking affirmative relief against *Clow,* the original plaintiff, so that despite invalidity of original service on *Merchants,* it was held to have submitted to the jurisdiction of the court by filing not a set-off but a claim for affirmative relief, thereby itself invoking the court's jurisdiction. What the Exchange through its Nominee filed in this case at bar was not an answer in recoupment against the Receiver who had made no claim against it.

The only other case so relied on by appellant was *Wabash Western Railway* v. *Brow,* 164 U.S. 271, which really does not touch the problem here, as it held only that removal of a cause to the federal court and subsequent trial there did not constitute a general appearance by the party removing.

The Court of Appeals' opinion is an incorrect holding that when a person files a claim or brings suit for an uncontested debt due him, a third party can come in that proceeding and, without process served on the claimant in accordance with the requirements of the Rules effectively assert against the claimant a personal tort claim, unrelated to the original claim. This is in direct conflict with the holdings of the Tenth Circuit in *Katchen* v. *Landry, supra* p. 21 and *Elkins et al* v. *First National Bank of New York,* 43 F. 2d 777 (C. A. 4 1930), where the appellants, judgment creditors of West Virginia Coal & Coke Co. in receivership,

sought by petition to obtain a preference in payment over claims of the respondent bank for money loaned to the company in receivership, a situation substantially identical with that at bar. The Circuit Court of Appeals (Parker, J.) affirmed district court action dismissing the petition, saying (43 F. 2d 779) that the petition did not belong in the receivership proceedings because "its effect would be to permit collateral and extraneous controversies of the character between claimants to be litigated in the receivership proceeding."

IV. CONCLUSION.

There is no justification on any basis for sustaining jurisdiction over the Petitioner never served with process. A writ of certiorari should issue.

Respectfully submitted,

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Boston, Massachusetts

October, 1964

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6287.

WILLIAM H. LEGATE,
CLAIMANT, APPELLANT,

v.

J. JOSEPH MALONEY, JR., RECEIVER,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

OPINION OF THE COURT.

July 13, 1964.

ALDRICH, *Circuit Judge*. This is an appeal from a final judgment of the district court, entered under F.R. Civ. P. 54(b) following a memorandum decision, reported in 204 F. Supp. 944, and a further opinion and order confirming, except in one respect, a detailed report of a special master. An earlier appeal was ordered dismissed as premature. *Legate* v. *Maloney*, 1 Cir., 1962, 308 F.2d 228, *cert. den.* 372 U.S. 912. The questions arise in a receivership proceeding instituted on the complaint of the Securities and Exchange

Commission winding up a brokerage firm, duPont, Homsey & Company, of which one Homsey was the managing partner. The firm was a member of the New York Stock Exchange, hereinafter the Exchange. Legate, the appellant, was, for the final year and a half, a limited partner. A retired small businessman, he had previously been a customer of the firm, and continued to be one. In the receivership proceeding appellant sought to rescind his limited-partnership agreement and to make claims as a creditor in lieu thereof, and to establish certain priorities. Alternatively, he claimed items allegedly due him under the agreement. Conversely, the receiver, appellee herein, sought, by way of counterclaim, to recover withdrawals by appellant from his capital account, allegedly in violation of the agreement. Also involved were various claims and cross-claims on appellant's customer's account by, and against, the receiver and for certain other relief. Finally, appellant sought to establish a claim against the Exchange, which the court declined to hear.

We have considered appellant's many contentions, legal as well as factual, but find only three requiring discussion. And with respect to these, since the evidence has not been reported, we must accept the master's findings and conclusions unless inconsistent or plainly wrong in the light of his subsidiary findings.

Our decision as to appellant's claim of rescission could rest upon either of two grounds. In the first place a limited partnership is wholly statutory. *Lancaster* v. *Choate*, 1863, 5 Allen (Mass.) 530. Under Massachusetts law it may be doubted whether even a limited partner may assert equitable rights as against innocent creditors. See Mass. G. L. c. 108 §§6(2), 39(a) and (b); c. 109 §29. For the earlier equity rule see, *e.g.*, *Richards* v. *Todd*, 1879, 127 Mass. 167; *Perry* v. *Hale*, 1887, 143 Mass. 540, 542; 1 Rowley, Partnership §39.0, at p. 753 (2d ed. 1960); Lindley, Partnership

599 (11th ed. Salt & Francis 1950); see also *Andel* v. *Smith*, 10 Cir., 1957, 248 F.2d 915, 918. One of the incidents of a limited partnership, no less than of a general partnership, is that representations as to capital contributions are made to the creditors of the firm. *Cf.* Mass. G. L. c. 109 §§2, 16, 17 and 23. In the case of *Richards* v. *Todd, supra*, on which appellant relies in other particulars, the court carefully restricted the effect of rescission *ab initio* to "as between the parties," and declared that since the defrauded partner "by holding himself out as a member of the firm rendered himself liable to creditors of such apparent firm," he was entitled to an indemnity. *Id.* at 173. None of appellant's cases holds to the contrary.

However, it is not necessary to reach this broad question. Appellant has not shown as plainly wrong the master's conclusory finding that the conduct of Homsey, "insofar as it is a question of fact, does not afford a basis for rescission." Appellant speaks of misrepresentation and concealment. We recognize no relationship here which would condemn concealment, as such, apart from the extent that such concealment might have made any affirmative representations materially false. Nor are we concerned with cases cited by appellant where a party concealed the fact that he was obtaining a secret advantage, and so could be said to have made an implied misrepresentation.

The affirmative representations found by the master were as follows.

1. That the firm was stable and of good reputation, and its standing "impeccable." The master found that "the partnership was not below standard financially."[1] He also

[1] It is true that because of prior infractions of its regulations the Exchange required the firm to maintain a higher margin of credit than usual, a matter Homsey did not disclose to appellant. However, the firm did thereafter conform. Neither the infraction nor the conformance has been shown to have injured the firm.

found that the basis for prior criticisms of the firm's failure to meet certain capital requirements of the Exchange had been attended to and cured. To the extent that any greater standing or repute was implied in the above characterizations, or by the word "impeccable," this would seem a typical example of seller's talk or "puffing." *Deming* v. *Darling*, 1889, 148 Mass. 504, cited with approval in *Fogarty* v. *Van Loan*, 1962, 344 Mass. 530, 532; *Boston Consol. Gas Co.* v. *Folsom*, 1921, 237 Mass. 565.

2. That an investment in the firm would be "safe" and "profitable." This is mere classic "prophecy." *Lynch* v. *Pennsylvania R.R.*, 1947, 320 Mass. 694, 695; *Harris* v. *Delco Products, Inc.*, 1940, 305 Mass. 362; *Fogarty* v. *Van Loan, supra.*

3. That Homsey was "affluent." Whatever this may mean,[2] appellant's evidence to indicate its untruthfulness, that Homsey made expensive personal borrowings from money lenders, established, on the master's findings, nothing which "jeopardize[d] the position of the firm in any way."

4. Finally, the master found that appellant "was impressed by . . . the Exchange's advertising campaign . . . to place faith in the firm" because of its membership. Possibly because the court refused to entertain appellant's attempted claim against the Exchange he failed to introduce evidence of what sort of representations the Exchange made, or, at any rate, failed to bring them to our attention. We cannot, accordingly, consider them for present purposes as having been actionable misrepresentations as distinguished from mere general puffing.

Summarizing, even if appellant's rescission claim is taken at its full value, the only matters that were kept from

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[2] The master did not find, in the words of appellant's brief, that Homsey said he was "a millionaire."

him related to circumstances which had caused, or in some cases merely had threatened to cause, past violations of certain fiscal requirements of the Exchange. There was no misstatement as to any present violation, or as to existing assets, or, in any substantial matter, as to any firm liability. Nor did these events of which appellant complains reflect upon Homsey's morals or ethics. The debacle came from Homsey's launching into a career of manipulation and embezzlement following appellant's entry into the firm, and was not shown to be connected with any prior event. While, conceivably, he might have found the other way, the master's conclusion that appellant was not materially misled was not plainly wrong.

However, when we come to a charge on Legate's customer's account (as to one item, only) and the master's handling of the receiver's claim that Legate should be held responsible for Homsey's misconduct because of his failure to disclose Homsey's misdoings before matters reached irremediable proportions, we have difficulties.[3] In November 1959 Homsey purchased 1000 shares of American Motors. The trading slips were all in Homsey's handwriting, but showed Legate as the purchaser. There is no indication that Legate knew anything of this, and the shares were subsequently paid for by the firm. In January 1960 Homsey purchased 2000 shares of Studebaker-Packard. These, too, were paid for by the firm. On February 11 Legate and Homsey went to Florida to visit some friends of Homsey's. Before departing Homsey told Legate that for procedural reasons he had put "a few shares" of American Motors and Studebaker-Packard in Legate's account. Legate protested, saying that he did not want the shares and had no money to pay for them. He was finally prevailed upon to

[3] The master found against the receiver as to this latter issue, and he has not appealed, but the relevancy of this portion of the case will appear later.

give Homsey two blank checks, with the understanding that the entire transaction was to pass through him simply for the firm's bookkeeping purposes, that the stock was not to belong to him, that his account would be credited with firm money before his checks were negotiated, and that the whole matter would be shortly taken off the books so far as he was concerned. On Legate's return from Florida in April or May he discovered that the matter had not been taken off the books. On the contrary, his account stood debited as of February 18 with $107,481 as the balance due, over and above the checks, to pay, not for "a few shares," but for the 3,000 shares above stated. The prices charged to him, incidentally, were Homsey's initial purchase prices, and not the substantially reduced value of the stock as of February 18. Legate protested to Homsey, and was told that the matter would be taken care of. At the time he received a statement from the firm's accountants showing these transactions as his. He twice refused to sign an acknowledgment of the correctness of the statement. On the other hand, he did not say why, but kept his own counsel. Nor, apparently, did he again check back to see whether Homsey had righted the matter. In fact, Homsey sold out the stock in June at a "loss" to Legate's account of $17,693.

In spite of having made all of the above specific findings the master concluded, apparently because it was not unusual for Legate to trust Homsey with blank checks, that Legate had "authorized" the personal acquisition of this stock, and so was chargeable with the loss. In our opinion such a conclusion, either by way of authorization or ratification, cannot stand in the light of these subsidiary findings. Legate may have been over-trusting, but as between himself as a customer and the firm he was not a purchaser.

Singularly enough, when he came to the receiver's claim against Legate because of his failure to disclose that

Homsey was playing fast and loose with his account and so might be doing the same with others, the master proceeded on a quite different basis. If, in fact, Legate had authorized the American Motors and Studebaker-Packard transactions Homsey's maximum misconduct was an over-extension of credit to Legate. The master did not treat Legate's non-communication on this basis. Rather, he expressly found that Legate "did not report the matter to anyone but Homsey because he felt that Homsey 'would take care of it' and that these securities would be taken off his account." Yet obviously there could be no reason for the shares to be taken off Legate's account if he had authorized the transaction as a purchase rather than as a bookkeeping convenience "to be taken care of" by Homsey.

The master's findings in these two matters are irreconcilable. For the reasons stated an adjustment must be made with respect to the claimed $17,693 loss which the receiver debited against Legate's account.[4]

Consideration of appellant's dismissed petition against the Exchange, which asserted misrepresentation, non-disclosure, and failure to live up to its rules and regulations, but for which, allegedly, he would not have been induced to become a member of the firm, requires a further recitation. The Exchange is, and has been at all times presently material, the assignee (by payment) of certain substantial customers' claims against the firm, claims which under no eventuality will be fully satisfied. Indeed, although the receiver exists as a separate party, and will have certain

[4] This might, correspondingly, suggest a reopening of the master's finding in Legate's favor with respect to his non-disclosure of Homsey's misconduct. While we do not decide that even though the receiver has not appealed we have no authority to reopen that matter if otherwise there would be an evident miscarriage of justice, this could not be the case here. As we have pointed out, the master's finding against the receiver already assumed that Legate had knowledge of the impropriety of this transaction.

personal claims, the real parties in interest and in competition with each other in the present proceedings are appellant and the Exchange. This fact is not concealed by the circumstance that the Exchange has assigned its interests to an attorney who, it so happens, is representing the receiver on his appeal.[5] As the Exchange's "nominee" or alter ego he filed a claim in the general receivership proceedings, and is and was directly financially interested in various aspects, particularly in the receiver's claim against appellant for failure to disclose Homsey's misdoings. In fact in the Receiver's Counterclaim which he signed as counsel for the receiver it was asserted, *inter alia*, that appellant's non-disclosure was a violation of his "duty to . . . the Exchange." While, perhaps, this allegation was only a makeweight for the receiver's claim on behalf of the creditors as a whole, it is an apt reminder of who those creditors really are.

This is an equitable proceeding. It cannot be that the Exchange can come in as a claimant through a nominee, and through the receiver prosecute claims against appellant for its ultimate benefit, and then say, either as a matter of right or of the district court's discretion,[6] that it is not "here" when appellant wishes to fight back. We see no

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[5] It is to be noted that six pages of the "receiver's" brief are devoted to arguing that the petition which appellant sought to have heard against the Exchange was properly dismissed for lack of jurisdiction.

[6] The district court appears to have dismissed appellant's petition against the Exchange on both grounds. Seemingly it was misled by the nominee arrangement, for its opinion recites, "The Exchange is asserting no claim against the assets of the receivership," a statement that is echoed in the receiver's brief. It is hard to see how that is so. The fact that, for reasons not worth developing, the Exchange by its nominee became a claimant under circumstances that might entitle it to be termed a Good Samaritan, does not meet the fact that any generosity on its part was not directed towards eliminating claims against appellant. Rather, the Exchange would be the direct beneficiary of those claims.

impropriety in the Exchange being represented by a nominee, as a matter of procedure, even when that nominee acts for the receiver as well, so long as there is no conflict of interest. But the Exchange cannot stick its head in the sand and avoid the normal consequences of its presence. One of those consequences is that it must be here defensively as well as aggressively. *Alexander* v. *Hillman*, 1935, 296 U.S. 222, 241-42. The order dismissing appellant's petition was error.

Judgment will be entered vacating the judgment of the district court and remanding the action for further proceedings not inconsistent herewith.

APPENDIX B

Memorandum of Decision

on

Petition of Claimant Legate and Counterclaim of Receiver Thereto.

May 1, 1962

FORD, D.J.

Petitioner Legate in 1959 became a limited partner in the defendant firm now in receivership, turning over to the firm $80,000 in cash and securities. In his proof of claim and petition Legate alleges that he was induced to become a limited partner by the misrepresentations of Homsey, the principal general partner of the firm. He further alleges that the New York Stock Exchange, both before and after the time he became a limited partner, had knowledge that Homsey and the firm in the conduct of their business had violated the law and the rules and regulations of the Exchange and failed to fulfill the duty allegedly incumbent upon it to investigate the conduct of the business and take appropriate disciplinary action against Homsey and the firm, which would have disclosed to Legate the falsity of the representations made to him by Homsey. On the contrary, he alleges, the Exchange engaged in an advertising campaign to persuade the public that member firms of the Exchange had a high standing and reputation for integrity, honesty and character and that petitioner was influenced by this advertising in becoming a limited partner.

Petitioner seeks to rescind his partnership contract on the ground of fraud, to establish his standing as a general creditor for the amount of his partnership contribution, to establish a claimed right to priority over the Exchange as a creditor in the distribution of the assets of the firm, and

to recover directly from the Exchange the amount of his partnership contribution less any amount which he may recover from the assets of the firm. The receiver moves to dismiss the petition insofar as it seeks the establishment of a priority over other creditors or direct recovery against the Exchange.

The first issue between the parties is as to the standing of Legate as a creditor of the firm. If he can prove that, as he alleges, he was induced to become a limited partner by the fraud and misrepresentation of Homsey, then his rights are governed by Mass. G.L. Ch. 108A § 39, which provides:

> "§ 39. Same subject; Rights of Party Entitled to Rescind Partnership Contract.—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—
>
> "(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and
>
> "(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and
>
> "(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership."

Thus Legate, if he can prove his allegations, is entitled to elect to rescind his partnership agreement and to stand

as a creditor of the firm for the amount of his partnership contribution. He is not however entitled to priority over the claims of the customers of the firm or their assignees but only to have his claim satisfied out of any partnership assets remaining after these claims of third parties have been satisfied.

Legate appears to contend that a partnership agreement induced by fraud is void ab initio and that therefore he is entitled to recover the amount of his contribution before claims of third parties against the firm can be satisfied. This contention cannot be accepted in the light of the clear provisions of § 39, whatever support for it may be found in the language of earlier cases such as *Richards* v. *Todd*, 127 Mass. 167. Legate argues that § 39 has no application here since it is found in Ch. 108A, dealing with partnerships in general, and that his rights must be governed by Ch. 109, dealing with limited partnerships. However, Ch. 108A § 7(2) provides that the chapter "shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith." Nothing has been pointed out in Ch. 109 to preclude the application of Ch. 108A § 39 to limited partnerships. Ch. 109 § 13(1) relied on by petitioner provides:

> "§ 13. Same subject; Transactions with Partnership.—(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets."

This means only that when a limited partner deals with the firm, not in his capacity as a limited partner, but in the same manner as a person not a member of the firm, he is to be treated in the same way as any non-member creditor as to those transactions. It has no application to his trans-

actions in his capacity as a partner, and does not preclude the application of Ch. 108A § 39 to govern his right to recover his partnership contribution.

The second issue is as to petitioner's right to enforce in this receivership proceeding his claim for affirmative recovery against the New York Stock Exchange. No service of process has been made on the Exchange. The Exchange is asserting no claim against the assets of the receivership. Its only connection with the receivership proceedings is that in accordance with a plan approved by the court the Exchange advanced funds to be used for the payment of certain substantial claims against the estate and in return these claimants assigned their claims to a nominee of the Exchange who as assignee has filed a claim as a general creditor for the amount of those claims. Thus the Exchange is not in the position of one who by appearing to assert his own claim against the estate subjects himself to the jurisdiction of the court as to defenses and counterclaims against it. Moreover, Legate's claim is not one which should appropriately be settled in this receivership proceeding. Even assuming that the Exchange should be held to have submitted to the jurisdiction of the court because its nominee asserts claims of which it is the ultimate beneficiary, Legate's petition neither attacks the validity of the nominee's claims in themselves, or sets forth any liability of the Exchange to the firm or its receiver. The claim asserted is an independent one of Legate against the Exchange. Determination of the right of Legate to affirmative recovery is in no way necessary or helpful to the administration of the receivership, but would rather hinder the receivership by involving it in an extraneous controversy.

The receiver has filed a petition in set off and counterclaim against Legate seeking to recover against him for alleged improper withdrawal of part of his capital contribution to the partnership and alleged failure to report

certain improper transactions of the firm which came to his attention. Legate moves to dismiss receiver's petition. The contention of Legate is that the partnership itself would have no right of recovery against him for any of the acts alleged and that therefore the receiver cannot recover since he cannot recover where the firm itself could not. The power of the receiver is not so narrowly restricted as Legate contends. While generally a receiver has no better standing than the defendant whose possession he takes over, there are occasions when he may have greater rights for the protection of creditors. Where, as here, a claim is asserted against a limited partner based on allegedly fraudulent or otherwise wrongful transactions, the receiver is not barred from recovery for the benefit of creditors by the fact that other partners may have participated in or consented to these transactions so as to bar the partnership itself from recovery. *McCandless* v. *Furland*, 296 U.S. 140; *Dabney* v. *Chase National Bank*, 201 F. 2d 635; *Central Hanover Bank & Trust Co.* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130.

The motion of the receiver to dismiss the petition of Legate is allowed with respect to the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange. The motion of Legate to dismiss the receiver's petition for set off and counterclaim is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6287.

WILLIAM H. LEGATE,
CLAIMANT, APPELLANT,

v.

J. JOSEPH MALONEY, JR., RECEIVER,
APPELLEE.

ORDER OF COURT

August 5, 1964

It is ordered that the petition for rehearing filed July 27, 1964, be, and the same hereby is, denied.

By the Court:

ROGER A. STINCHFIELD, *Clerk.*

By: /s/ DANA H. GALLUP,
Chief Deputy Clerk.

[cc: Messrs. Horblit and Jenckes.]

APPENDIX D

New York Stock Exchange
11 Wall Street
New York 5, N. Y.

November 10, 1960

W. Arthur Garrity, Jr., Esquire
As Receiver of DuPont, Homsey & Company
and Not Individually
31 Milk Street
Boston 9, Massachusetts

Dear Mr. Garrity:

This letter sets forth the agreement of the New York Stock Exchange with you as Receiver of DuPont, Homsey & Company ("the firm") pursuant to which you have, at our request, filed with the U. S. District Court for the District of Massachusetts a plan for partial liquidation of the firm. You have made therein certain representations concerning the firm's abilities to meet its obligations to creditors in the course of liquidation. A copy of the said plan is attached hereto and incorporated herein by reference and made a part thereof. Our agreement is made in consideration of your having filed the said plan and the accompanying documents seeking its approval.

You represent in the said plan that the plan is based upon a proposal made by us that we will acquire the subordinated claims of five claimants against the firm, known as the "special claimants," and that such acquisition will result in eliminating claims totaling approximately $690,000 against a single and separate fund for customer creditors and thereby relieving the general creditors' fund from these

claims until all other creditors have been paid in full. Since you filed your plan the dollar amount of these claims has been increased from approximately $690,000 to approximately $763,000. We agree that the following are the special claimants referred to, and that the amounts set after their names are the amounts for which their respective escrow agreements in the form annexed to your plan will provide:

1. Estate of John C. Miller of Palm Beach, Florida, represented by Walter D. Malcolm, Esq., Bingham, Dana & Gould, One Federal Street, Boston, Mass.	$311,250.00
2. Marie M. Miller of Palm Beach, Florida, represented by Walter D. Malcolm, Esq., Bingham, Dana & Gould, One Federal Street, Boston, Mass.	110,325.00
3. Estate of George Dahood, represented by George J. Shagory, Esq., 92 State Street, Boston, Mass.	32,017.96
4. Dr. Francis S. and Anna B. Keating of Pompano Beach, Florida, represented by John L. Casaly, Esq., 6 Main Street, Natick, Mass.	110,000.00
5. Manja Tritsch of Boston, Mass., represented by Mark M. Horblit, Esq., 84 State Street, Boston, Mass.	200,000.00
TOTAL	$763,592.96

The Exchange will enter into an escrow agreement in the form attached to the plan as Exhibit B with any of these claimants who approves the escrow agreement and agrees that the amount set after his or her name is the maximum

amount of his claim against DuPont, Homsey & Company or its Receiver, except for his open account positions held by you.

The plan filed by you furthermore represents to the Court that we have agreed to make available to you up to a certain stated amount of additional funds to take care of priority expenses fixed by the Court, if the assets of the Receiver remaining after the payment of priorities and of customers' and creditors' claims which have not been barred are not sufficient therefor. You and we acknowledge and agree that the maximum amount which we have agreed so to make available is $215,000, and that this amount shall also be available for the payment by you of any bona fide customer claim not fully satisfied as provided in paragraph 14 of the plan (without reference to the value of the assets in the receivership estate which are required for the payment of general creditors), in such proportions and amounts as the Court may direct on your ex parte application. We agree to pay any such amounts (not exceeding $215,000 in the aggregate) to you upon your written request received by us prior to the termination of the receivership. We expect that approximately $65,000 of the said $215,000 may be used by you for the payment of four or more customer claims arising out of misappropriations occurring in the firm's Worcester branch office when proved to your satisfaction, that there may be similar claims arising during the course of your liquidation which may be similarly paid, and that we will have the benefit of any net recoveries you may make with respect to such claims.

You and we agree that all obligations of the Exchange under the plan, the escrow agreements and this undertaking are subject to the fulfillment to our satisfaction of all of the conditions set forth in paragraph 7 of your plan and shall terminate if at any time before the establishment of the escrow funds a petition in bankruptcy is filed by or

against the firm unless such petition is dismissed within thirty days, and if, after the escrow funds are established, any such petition is filed and not so dismissed, our obligation hereunder will be limited to the payment of priority expenses as determined by the Court.

Very truly yours,

NEW YORK STOCK EXCHANGE

By Edward C. Gray
Executive Vice President

Accepted:

W. ARTHUR GARRITY JR.
Receiver

Approved by U. S. District Court for the District of Massachusetts this 10th day of November, 1960.

FRANCIS J. W. FORD

APPENDIX D-1

DUPONT, HOMSEY & COMPANY
W. Arthur Garrity, Jr., Receiver
31 Milk Street
Boston 9, Massachusetts

December 20, 1960

New York Stock Exchange
11 Wall Street
New York 5, New York

Dear Sirs:

This is in reference to your proposal to remove Mrs. Rita H. Dahood and the Estate of Emory D. Heald as

substantial claimants against the estates of duPont, Homsey & Company and Anton E. Homsey by establishing separate escrow funds in the form of the Exhibit B attached to the Receiver's Plan for Partial Liquidation for the benefit of Mrs. Dahood and that Estate in an amount not to exceed $20,000 for Mrs. Dahood and $15,000 for the Heald Estate, funds for which will come from the $215,000 fund the Exchange has undertaken to provide in its letter to me dated November 10, 1960.

The Exchange may accept this letter as my approval to such use of not more than $35,000 of the $215,000 commitment, it being understood that as between us, said $35,000 will be deemed to have come from the $65,000 referred to in the last sentence of the next to last paragraph ending on page 3 of the Exchange's letter dated November 10, 1960, and that the last clause of said sentence is hereby amended subject to the approval of the Court to read as follows: "and that we will have the benefit of any net recoveries in excess of $35,000 you may make with respect to such claims."

I further understand that any part of the $35,000 above referred to not used in settlement of those two claims will revert directly to the $215,000 fund.

It is further understood that this proposed settlement of the claims of Mrs. Dahood and the Heald Estate against the aforesaid receiverships does not reduce or otherwise affect any and all claims which W. Arthur Garrity, Jr., Receiver of duPont, Homsey & Company and Anton E. Homsey, may have against Rita H. Dahood, her heirs or assigns.

The Escrow Agreement for the benefit of the Estate of John C. Miller authorizes you to instruct the Escrow Agent to pay from the escrow deposit to persons claiming a lien on certain securities such sums as you may direct, against

delivery of the securities to the Escrow Agent. I understand that your counsel and counsel for the Harvard Trust Company have agreed that as soon as the present restraining order obtained by Cecil Rose against the Harvard Trust Company is lifted, the Trust Company will deliver 4,000 shares of The Mengel Company stock to the Escrow Agent against receipt of $16,000, and that under the provisions of the Escrow Agreement the Escrow Agent will on receipt of such stock pay $160,000 to you from the escrow fund. You have advised me that you are willing to make an additional $160,000 available to me on the terms and conditions set forth in our letter agreement of November 10, 1960 and those hereinafter set forth.

In consideration of my proceeding promptly with the consummation of the Receiver's Plan for the Partial Liquidation of duPont, Homsey & Company to the fullest extent permitted by the assets of the receivership estate of duPont, Homsey & Company (including assets to which the Receiver is or may be entitled or which he may receive), you agree to make available to me an additional amount of $160,000 (whether or not you receive that sum from the Harvard Trust Company) which the Receiver may, if the assets of the receivership estate are not sufficient therefor, use to pay priority claims, claims of customers and claims of creditors, but neither the $215,000 provided for in the November 10, 1960 letter nor the additional $160,000 provided for in this letter is to be used to pay claims of general or limited partners for their capital contributions, profits, interest, or other compensation for their capital contributions.

Very truly yours,

W. Arthur Garrity, Jr.

W. Arthur Garrity, Jr.
Receiver

The New York Stock Exchange hereby agrees to the above, including the amendment to the letter dated November 10, 1960, this twentieth day of December, 1960.

NEW YORK STOCK EXCHANGE

By Edward C Gray
Executive Vice President

Approved by the U.S. District Court for the District of Massachusetts this 20 day of December, 1960.

FRANCIS J W FORD

APPENDIX E

Excerpts from the Opinion of the Supreme Court in *Hanson* v. *Denckla*, 357 U.S. 235, pages 250 and 251.

In personam jurisdiction. Appellees' stronger argument is for *in personam* jurisdiction over the Delaware trustee. They urge that the circumstances of this case amount to sufficient affiliation with the State of Florida to empower its courts to exercise personal jurisdiction over this nonresident defendant. Principal reliance is placed upon *McGee* v. *International Life Ins. Co.*, 355 U.S. 220. In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U. S. 714, to the flexible standard of *International Shoe Co.* v. *Washington*, 326 U. S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319.

We fail to find such contracts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643.

MOTION FILED

NOV 21 1964

No. 633

In the Supreme Court of the United States

NEW YORK STOCK EXCHANGE,
Petitioner

v.

WILLIAM H. LEGATE,
Respondent

MOTION TO SUPPLEMENT PETITION AND APPENDIX F

MARCIEN JENCKES
RICHARD WAIT
Attorneys for Petitioner

30 State Street
Boston, Massachusetts 02109
November 1964

PRESS OF GEO. H. DEAN CO., BOSTON

In the
Supreme Court of the United States

OCTOBER TERM 1964

No. 633

NEW YORK STOCK EXCHANGE,
Petitioner

v.

WILLIAM H. LEGATE,
Respondent

MOTION TO SUPPLEMENT PETITION

Now comes the Petitioner and says that there has been published since its petition was filed a decision of the Court of Appeals for the Fifth Circuit which shows a further conflict with the decision sought to be reviewed.

WHEREFORE the Petitioner moves that its petition for a Writ of Certiorari in the above entitled case be supplemented by adding on page 24 before IV Conclusion the following:

A further conflict among the Circuits appears from the decision of the Fifth Circuit Court of Appeals, in *Gill* v. *Phillips* decided October 15, 1964 C. A. 5 number 20780; 2 CCH Bankruptcy Law Reports, New Developments. 61199, pages 69743 et seq. particularly 69746 and 69748; (Appendix F, *infra* pp. 3 to 19, particularly pp. 11, 16 & 17).

There, in a bankruptcy proceeding, one who had made claims in the District Court similar to those made by the Petitioner here was held entitled to insist that a counterclaim not arising out of the same transaction be the subject of an independent plenary action and not of summary jurisdiction.

By its attorneys

MARCIEN JENCKES

RICHARD WAIT

Boston, Mass.
Nov. 17, 1964

APPENDIX F

GILL v. PHILLIPS.

United States Court of Appeals, Fifth Circuit. No. 20780. October 15, 1964. Appeal from United States District Court, Southern District of Texas.

Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This interlocutory appeal, which was filed pursuant to 28 U. S. C. A. § 1292(b), presents for our determination the difficult question whether, under the facts and in the circumstances before us, the appellant Ned Gill impliedly consented to the summary jurisdiction of the Referee in Bankruptcy to cancel and set aside certain allegedly fraudulent or preferential transfers made to Gill by the bankrupt, Tinney Produce Company, Inc.[1] Since we do not agree with the District Court that the findings of the referee support a conclusion that Gill's actions constituted a consent to summary jurisdiction, we reverse.

FACTS

The facts, although undisputed, are complex, and it is necessary to explain the financial arrangements which Gill made with the bankrupt and to detail with some particularity the rather involved chain of events which transpired in the Bankruptcy Court following the filing of the bankruptcy petition.

The bankrupt, Tinney Produce Company, Inc., was incorporated in Texas in April 1958. In order to obtain sufficient working capital to commence operations, it effected a financial arrangement with Gill and the Bank of

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[1] Hereinafter referred to as "the bankrupt" or " the company."

Texas. In return for Gill's guaranty of the bankrupt's note, a deed of trust on the bankrupt's realty, a chattel mortgage of certain of its personal property, an assignment of its accounts receivable, and a pledge of all its capital stock, the Bank of Texas agreed to loan the bankrupt $100,000.00. The amount of this loan was subsequently increased to $200,000.00 upon the strength of Gill's guaranty of a note for that amount. In consideration of Gill's guaranty on the note, the bankrupt's four shareholders conveyed all the capital stock to him in a voting trust, which was to be effective for ten years or until the bankrupt's indebtedness to the Bank of Texas had been paid. Also, Gill was granted an option, subordinate to the Bank's pledge, to purchase the capital stock of the bankrupt. Hence, Gill bargained for an opportunity to buy into the corporation after it had begun to operate successfully. However, at no time did Gill exercise either the stock option or the powers he held under the voting trust.

The company did not prosper, and in March 1959 it borrowed $50,000.00 from Gill. This loan was unsecured.[2] Apparently the bankrupt began repaying this amount almost immediately, for by the time of the filing of the bankruptcy petition, the balance owing to Gill on this note was only $12,500.00.

Even with the additional financial aid which Gill had furnished, the company faltered. Its demise as a going concern was perhaps hastened by the resignation of its President after he had been accused of conduct contrary to the company's interest, and the withdrawal of two other officers to set up a competing business. By December 12, 1959, the corporation was a mere shell, all the officers and direc-

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[2] A deed of trust and chattel mortgage were executed by the company in Gill's favor in November 1959 to secure this loan. However, these security interests were released by Gill on December 31, 1959, upon a partial repayment of the loan. Therefore, Gill presently holds no security for this loan.

tors having resigned. On January 4, 1960, an involuntary petition in bankruptcy was filed against the company in the District Court for the Southern District of Texas.

For almost a year and a half, no action was taken in the bankruptcy proceedings, although various pleadings were filed by the petitioning creditors, the bankrupt, and Gill. The reason for the delay is not apparent from the record.

During this period, however, Gill purchased the $200,000.00 note which the Bank of Texas held and which had a balance due of $57,866.32. The bank then assigned to Gill all the security which it held on the claim, including all the capital stock in the bankrupt corporation which had been pledged to it. On May 31, 1961, Gill foreclosed on the pledged stock and became sole owner of the company. This foreclosure was evidently for the purpose of effecting an arrangement under Chapter XI of the Bankruptcy Act with the company's unsecured creditors. Four days after Gill's foreclosure on the stock, the company, now clearly under Gill's control, petitioned for an arrangement pursuant to § 321 of Chapter XI, 11 U. S. C. A. § 721. Under the terms of the bankrupt's proposal, the unsecured creditors had an election to accept either full payment of their claims over an extended period of time out of the net distributable earnings of the company, or a ten per cent final cash settlement. Gill contracted with the company to furnish the amount necessary to make the ten per cent cash payments called for under the arrangement proposal. Gill also agreed not to foreclose on the security interests he held on the bankrupt's property so long as payments were made to him on the secured indebtedness out of the net distributable earnings of the company.[3]

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[3] The agreement provided as follows:

"1. That upon demand he [Gill] will pay in cash to the Trustee appointed to receive the same such amounts as may be required to be paid to the unsecured creditors electing to accept or presumed to

On July 20, 1961, Gill filed Proof of Claim No. 48, which asserted that a $12,500.00 balance was owing to Gill on the $50,000.00 unsecured note, and Proof of Claim No. 49, a priority claim for $27,272.74, the amount Gill had paid to the lessor of the bankrupt, Houston Produce Terminal, Inc., to preserve the lease on the premises that the bankrupt occupied. Gill voted these two claims, as well as five or six claims of other creditors, over some of which he had powers of attorney, in favor of the arrangement. In addition, Gill's attorney filed claims on behalf of at least twenty-five other creditors and voted them in favor of the proposal. The arrangement was accepted by the requisite number of creditors, after the amount which would be paid to those unsecured creditors who elected to accept an immediate cash settlement was increased from ten to fifteen per cent of their claims. The referee confirmed the arrangement on October 13, 1961, and directed the bankrupt to deposit $35,000.00 by October 23 to satisfy those creditors who elected to take the fifteen per cent cash settlement.

Discord developed over the question whether the attorneys for the petitioning creditors were to be compensated for their services. Gill and the bankrupt filed a joint objection to the petition for the allowance of attorney's fees, and apparently as a result of this disagreement, the bankrupt failed to make the deposit necessary to fulfil the terms of the arrangement. Hence, on October 26, 1961, the

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have elected to accept 10% of their claims under said Arrangement as therein provided, upon the condition that such payments shall be secured and agreed to be paid as hereinafter provided.

"2. That pending the consummation of said Arrangement, he will accept in payment of the secured indebtedness owing to him by the Debtor the net distributable earnings of the Debtor (as in said Arrangement defined) as the same accrue thereunder, and so long as such payments are so made will withhold the foreclosure of the liens held by him securing the same; provided, however, that such liens and indebtedness and any additions thereto shall be subject to renewal and extension by Debtor as hereinafter provided."

referee entered an order dismissing the arrangement proceedings, adjudicating Tinney Produce a bankrupt, and ordering that bankruptcy be proceeded with, all as directed by 11 U. S. C. A. §§ 777(1). The appellee was appointed receiver, and later trustee, of the bankrupt estate, no trustee having been appointed while the arrangement proceedings were pending.

In November 1961, with the trustee's approval, Gill agreed to make the rental payments necessary to keep the bankrupt's lease alive. He was therefore authorized by the referee to collect the rents from the subtenants of the bankrupt and apply these amounts to the installments which he had paid to the bankrupt's lessor, Houston Produce Terminal, Inc., to preserve the lease.[4] The referee's order expressly stated that it should "not in any manner prejudice the rights of Ned Gill or H. A. Phillips, Trustee in Bankruptcy, as such rights now exist prior to the entry of this Order." About a year later, the referee, upon application of the trustee, authorized Gill to collect the accounts receivable of the bankrupt, applying 75 per cent of the amount he collected to the reduction of his secured indebtedness and 25 per cent to the expense of collection.

Pursuant to an order of the referee, Gill filed his secured claims against the estate on December 11, 1961. All these claims were embodied in Proof of Claim No. 82, which asserted (1) a secured claim for $57,366.32, the amount due on the $200,000.00 note originally payable to the Bank of Texas and now owned by Gill; (2) a secured claim asserted by Gill by way of subrogation for $12,339.57, an amount allegedly paid by Gill to Houston Produce Terminal to

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[4] Apparently, Gill was authorized to pay the rent installments because the trustee had insufficient funds available to make the payments but deemed it in the best interest of creditors to preserve the lease as an asset of the bankrupt estate. However, the lease was subsequently ordered abandoned upon application of the trustee, and Gill acquiesced in this abandonment.

satisfy an old indebtedness of the bankrupt for which it had executed a chattel mortgage as security; and (3) a first priority claim arising out of the payment of the rent to Houston Produce Terminal in the amount of $29,053.32. This latter claim was in effect an expansion of Proof of Claim No. 49, which had been filed during the arrangement proceedings.

Counterclaim

The trustee filed a timely answer and counterclaim in which he asserted that in the four-month period immediately preceding the filing of the bankruptcy petition, Gill had received from the bankrupt payments totalling $20,500.00. In his counterclaim the trustee asked that these payments be "cancelled and set aside" as preferential transfers under § 60, 11 U. S. C. A. § 96, or as fraudulent conveyances under § 67(d)(2), 11 U. S. C. A. § 107(d)(2) and Articles 3996 and 3997. Vernon's Annotated Civil Statutes of Texas.[5] Gill filed a timely plea in which he objected to the summary jurisdiction of the referee to determine the counterclaim.[6]

Referee's Findings

After a hearing on the jurisdictional question, the referee found, on the basis of the facts outlined above, that Gill's numerous prior appearances in the bankruptcy court con-

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[5] The trustee's counterclaim also asked for other relief, but these additional requests are not subject to dispute here.

[6] Although Gill's plea objecting to the jurisdiction of the referee was not filed until October 23, 1962, long after the time fixed by Fed. R. Civ. P. 12, the trustee had agreed not to object to a delayed filing. Therefore, the referee treated the plea as timely filed under § 2(a)(7) of the Bankruptcy Act, 11 U. S. C. A. § 11(a)(7), thus eliminating any question of consent by failure to object to jurisdiction.

stituted an implied consent to the summary jurisdiction of the referee to determine the issues raised in the trustee's counterclaim and to grant any appropriate relief.[7] Also, the referee concluded that Gill was the alter ego of the bankrupt corporation. This conclusion was predicated on the referee's finding that Gill, under the terms of the voting trust and, after May 31, 1961, as the sole shareholder of the bankrupt, "has been in a positoin to exercise complete control of Bankrupt" and that "Gill did, in fact, exercise that control." The District Court adopted all the findings and conclusions of the referee, and this interlocutory appeal followed.

JURISDICTION

Section 2(a)(7) of the Bankruptcy Act, 11 U. S. C. A. § 11(a)(7), contains a general grant of jurisdiction to the federal district courts, as courts of bankruptcy, to "cause the estates of bankrupts to be collected, reduced to money, and distributed, AND DETERMINE CONTROVERSIES IN RELATION THERETO, except as herein otherwise provided. . ." (emphasis supplied) These powers may be carried out in summary proceedings before the referee, in which parties are brought into court by an order to show cause and issues are resolved upon affidavits.[8] Congress, however, has created an exception to this broad jurisdictional grant by the provisions of § 23(b), 11 U. S. C. A. § 46(b), which provides: "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts

[7] Although the trustee's counterclaim does not contain a specific request that Gill be required to pay over the $20,500.00 in transfers which the trustee seeks to avoid, presumably he intends to enforce a decision in his favor by petitioning the bankruptcy court for a turnover order directed to Gill, thus invoking the summary powers of the bankruptcy court to the fullest possible extent.

[8] See generally 2 Collier, Bankruptcy ¶23.02[2].

where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, UNLESS BY CONSENT OF THE DEFENDANT, except as provided in sections 60, 67, and 70 of this Act." (emphasis supplied) Hence, and adverse claimant, under section 23, may by his actions manifest a consent to the determination of his claim by the bankruptcy court through summary proceedings before the referee, even though the nature of his claim is such that he has a right to insist that it be decided in a plenary suit.[9] Consent to summary jurisdiction may express, as by stipulation, or it may be implied. A claimant may impliedly consent, for example, by failing to state his objection to the referee's jurisdiction within the time specified by law or rule of court.[10] The courts have also inferred consent from certain situations in which the claimant, by invoking the jurisdiction of the bankruptcy court, has manifested a willingness to have certain issues

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[9] Section 60(b), 11 U. S. C. A. § 96(b), which relates to the trustee's power to avoid preferential transfers, provides:

"For the purpose of any recovery or avoidance under this section, WHERE PLENARY PROCEEDINGS ARE NECESSARY, any State court which would have had jurisdiction and any court of bankruptcy shall have concurrent jurisdiction." (emphasis added)

Substantially identical provisions exist in § 67(e), 11 U. S. C. A. § 107(e), and § 70(e)(3), 11 U. S. C. A. § 110(e)(3). Hence, Congress has permitted the trustee to institute plenary suits in any federal district court, even though the bankrupt could not have brought the suit in that court. Some question has been raised as to whether the language which is emphasized above requires that all suits brought under these sections be plenary in nature. However, this Court adheres to the interpretation set forth in B. F. Avery & Sons Co. v. Davis, 192 F. 2d 255, 258 (5 Cir. 1951):

"We take it that the words 'where plenary proceedings are necessary' do not mean that plenary proceedings are necessary in all such cases; but 'where' means 'if', and implies that there may be cases in which summary proceedings in bankruptcy are proper."

[10] See 11 U. S. C. A. § 11(a)(7); Nicholas v. Peter Pan Snack Shop, Inc., (5 Cir. 1958) 256 F. 2d 349.

finally adjudicated by that court. On this latter basis, the referee in the instant case concluded that the appellant Gill consented to the exercise of the referee's summary powers to determine the question whether the $20,500.00 Gill had received was voidable by the trustee.

Perhaps it is appropriate to note at the outset that consent to summary jurisdiction is not lightly to be inferred. As this Court has emphasized before, the admittedly desirable end of expeditious administration of bankrupt estates should not be allowed effectively to eliminate the protection afforded litigants by the traditional safeguards of a plenary suit, with its right to trial by jury and cross-examination of witnesses. See e.g., Fox Jewelry Co. v. Lee, 264 F. 2d 720 (5 Cir. 1959); Cf. Beacon Theatres, Inc. v. Westover, 359 U. S. 500 (1959). Therefore, we approach the issue of consent to summary jurisdiction with a certain degree of circumspection.

We do not view any of Gill's appearances in the bankruptcy proceedings as evidencing a willingness on his part that the bankruptcy court decide the preference and fraudulent conveyance issues in summary proceedings. Consent should be inferred only from a clear manifestation by the adverse party that he is submitting a particular issue to the summary jurisdiction of the referee for determination. Gill's contract with the bankrupt to deposit the amount necessary to fulfil the proposed arrangement and his voting a number of claims in favor of the arrangement, either himself or by his attorney, were all directed to the end of effectuating a settlement with the creditors in which the company would be retained as an operating entity. Gill had invested heavily in the bankrupt, and, understandably, wished to salvage the company if possible. In the absence of any evidence that Gill manipulated the arrangement proceedings to the detriment of the unsecured creditors, we find no basis for an implied consent to summary jurisdiction. Furthermore, Gill, as the moving force behind the

arrangement and as an unsecured creditor, had the right to object to the payment of attorneys' fees, and his joint appearance for the purpose of contesting the petition of the attorneys should not be deemed a consent to the referee's jurisdiction, at least where there is no evidence in the record that his action was motivated by bad faith.

Nor should consent be inferred from the fact that Gill agreed to make the installment payments necessary to preserve the bankrupt's lease or that he acquiesced in its subsequent abandonment. Both of these orders were initiated by the trustee and the first expressly stipulates that neither Gill nor the trustee will be prejudiced thereby. Likewise, the order authorizing Gill to collect the accounts receivable of the bankrupt and to apply them to his secured claims was entered upon application of the trustee. These accounts had been assigned to Gill previously by the Bank of Texas when he purchased the $200,000.00 note, and the trustee's order merely authorized him to realize on his security interest. It is not significant that these orders were prepared by Gill's attorneys.

The referee also based his finding of consent on the fact that Gill filed Proofs of Claim Nos. 48 and 49 in the arrangement proceeding and Proof of Claim No. 82 in the subsequent bankruptcy proceeding. To hold that the mere filing of a proof of claim constitutes consent to the jurisdiction of the referee to make a summary determination with respect to an unrelated transaction is directly contrary to this Court's holding in B. F. Avery & Sons Co. v. Davis, (5 Cir. 1951) 192 F. 2d 255. In that case the claimant filed a proof of claim in the bankruptcy proceedings for the balance due on certain farm machinery which the bankrupt had purchased on open account. The same claimant, however, had sold the bankrupt other farm machinery pursuant to a Dealer's Contract under which it asserted the right to repossess the machinery if the bankrupt defaulted in his payments. Within the four-month period preceding bank-

ruptcy, the bankrupt defaulted and the claimant repossessed certain machinery. The trustee, invoking § 57(g) of the Bankruptcy Act, 11 U. S. C. A. § 93(g), asked the trustee to disallow the open account claim unless the claimant surrendered the machinery he had repossessed. This request was premised on the theory that the repossession constituted a voidable preference. This Court held that, since consent could not be inferred from the mere filing of the proof of claim, a plenary suit was necessary unless, upon a preliminary inquiry, the referee found that the claimant's possession of the farm machinery was merely colorable.

In the instant case, Proof of Claim No. 49 was a priority claim based upon amounts paid by Gill to preserve the bankrupt's lease. Proof of Claim No. 82 contained three parts: a secured claim for the amount due on the $200,000.00 note which Gill had purchased from the Bank of Texas, a secured claim for an old indebtedness which Gill had paid to Houston Produce Terminal, and an expansion of Proof of Claim No. 49. Clearly, none of these claims were predicated on the same transaction as the alleged voidable transfers, and Avery, threfore, is controlling.

However, Gill also filed Proof of Claim No. 48 in the arrangement proceedings. This claim asserted that a $12,500.00 balance was due on the $50,000.00 unsecured note of the bankrupt. The $20,500.00 which the trustee seeks to avoid in his counterclaim consisted of payments made in partial satisfaction of this same loan. Hence, the two claims are likely based on the same financial transaction[11] and cannot be disposed of simply by reference to Avery.

Much controversy has centered around the question to what extent the filing of a proof of claim constitutes consent to the summary jurisdiction of the bankruptcy court.[12]

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[11] The referee made no finding that Proof of Claim No. 48 and the trustee's counterclaim arose out of the same transaction.

[12] See generally 49 Va. L. Rev. 571 (1963).

Most of the circuits have now adopted the proposition that filing a proof of claim is consent to the summary adjudication of all controversies arising out of the same transaction which is the basis of the creditor's claim.[13] Only one court has extended this rule to include a counterclaim by the trustee which arose out of a separate and distinct transaction.[14] The position of the Fifth Circuit since B. F. Avery & Sons Co. v. Davis, supra, is not clear where the claim and counterclaim are based on the same transaction. Although the claim and counterclaim in Avery arose out of unrelated transactions, that distinction was not the articulated rationale of the decision.[15]

In the instant case, we have before us a somewhat peculiar situation. Gill filed Proof of Claim No. 48 in the arrangement proceeding. This claim was premised on the $50,000.00 unsecured note that he held and it appears from the record that the alleged preferences or fraudulent conveyances which the trustee sets forth in his answer and counterclaim

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[13] See Peters v. Lines (9 Cir. 1960) 275 F. 2d 919; Continental Cas. Co. v. White (4 Cir. 1959) 269 F. 2d 213; In re Majestic Radio & Television Corp. (7 Cir. 1955) 227 F. 2d 152; In re Solar Mfg. Corp. (3 Cir. 1952) 200 F. 2d 327 (Chapter X proceedings); In the Matter of Petroleum Conversion Corp. (3 Cir. 1962) 196 F. 2d 728, affirming 99 F. Supp. 899 (D. Del. 1951); In re Nathan (S. D. Calif. 1951) 98 F. Supp. 686; Columbia Foundry Co. v. Lochner (4 Cir. 1950) 179 F. 2d 630; Chase Nat'l Bank v. Lyford (2 Cir. 1945) 147 F. 2d 273 (railroad reorganization proceedings); Floro Realty & Inv. Co. v. Steem Elec. Corp. (8 Cir. 1942) 128 F. 2d 338; Florance v. Kresge (4 Cir. 1938) 93 F. 2d 784.

[14] Inter-State Nat'l Bank v. Luther (10 Cir. 1955) 221 F. 2d 382. In this case, heard en banc by the court, there was a strong dissent by Judge Phillips, joined by Judge Pickett, who would have limited consent to situations in which the claim and counterclaim arose out of the same transaction.

[15] Two district courts have followed Avery, but in both of those cases the claim and counterclaim arose out of different transactions. See In re Houston Seed Co. (N. D. Ala. 1954) 122 F. Supp. 340; In re Tommie's Dine & Dance (N. D. Tex. 1952) 102 F. Supp. 627.

were partial repayments of that same loan. Of course, at this time Gill knew that ultimately the company might be adjudicated a bankrupt, and that, if this occurred, the payments he had already received on that note would be subject to avoidance by the trustee. Nevertheless, at the time he filed the claim, the issue of whether he had received a preference or fraudulent conveyance could not arise, since such transfers are not voidable in an arrangement proceeding. When bankruptcy was finally adjudicated and the arrangement proceedings were dismissed, the bankruptcy proceeding was deemed reinstated and was to be conducted as nearly as possible as if the Chapter XI proceedings had never been filed.[16] Thus, it would appear that proofs of claim which are filed in an arrangement proceeding must be treated as if they had been filed in the subsequent bankruptcy proceeding, unless, of course, they are withdrawn or otherwise disaffirmed.

The trustee, however, took no action against Gill with respect to the alleged preferences until after Gill filed the secured and priority claims which are embodied in Proof of Claim No. 82. In answer to this claim, the trustee, apparently pursuant to § 57(g), asserted that the $20,500.00 that Gill had received as payments on the $50,000.00 unsecured loan were either preferences or fraudulent conveyances. Therefore, he prayed that the referee deny the proof of claim or, in the alternative, disallow it until Gill surrendered the allegedly voidable transfers. Clearly Avery controls as to the relief which the trustee requests in his answer, since the transactions on which the claim and answer are based, are different.

However, the trustee, in conjunction with his answer, filed a pleading which is styled "Counterclaim of H. A. Pfillips, Trustee, Against Ned Gill." In it he asks, among other things not material here, that the allegedly voidable

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[16] See 11 U. S. C. A. § 778(1).

transfers to Gill be "cancelled and set aside." There is no indication in the record whether this counterclaim was intended as a set-off only to the secured and priority claims except that it was filed concurrently with the answer to those claims. The trustee makes no attempt to justify summary jurisdiction on the ground that the counterclaim and Proof of Claim No. 48, which was filed during the arrangement proceedings, arose out of the same transaction, and only the appellant's brief raises this point at all. In light of the ambiguous nature of the trustee's pleadings, the absence of any assertion by the trustee that the cause of action in his counterclaim arose out of the same transaction as Proof of Claim No. 48, the uncertainty as to the breadth of the Avery decision and the absence of argument as to its applicability, and the fact that Gill's Proof of Claim No. 48 was filed prior to the adjudication of bankruptcy, we do not feel justified in finding that Gill consented to the exercise of summary jurisdiction. However, we do not intend our decision in this case to be interpreted as either an acceptance or repudiation of the "same transaction" theory by this Circuit. We wish to reserve a decision on that question for a case that brings the issue squarely into focus.

Alter Ego

We turn now to the referee's finding that Gill's control over the corporation was so complete that he was, in legal contemplation, the bankrupt's alter ego. Since the referee has summary jurisdiction over the bankrupt himself, it follows that his jurisdiction extends to any person or corporation who has so acted that it would be inequitable not to treat his affairs as those of the bankrupt. In concluding that Gill was the bankrupt's alter ego, the referee apparently relied upon Gill's powers under the voting trust, his ownership, after May 31, 1961, of all the capital stock of

the bankrupt, and his activity in attempting to effect an arrangement with the bankrupt's unsecured creditors. There are a number of cases in which a referee's summary turnover order has been sustained by "piercing the corporate veil," but we have found no case in which there was not some evidence of an attempt to defraud the creditors of the bankrupt or otherwise manipulate the bankrupt's affairs to the creditors' detriment.[17] As this Court stated in Maule Industries, Inc. v. Gerstel (5 Cir. 1956) 232 F. 2d 294, 297:

"Courts are reluctant to pierce the corporate veil and destroy the important fiction under which so much of the business of the country is conducted, and will do so only under such compelling circumstances as require such action to avoid protecting fraud or defeating public or private rights."

In the instant case the referee found that Gill was in a position to control the bankrupt company and that he actually exercised that control. However, the mere existence and exercise of control over a bankrupt corporation is an insufficient warrant for destroying the corporate fiction and subjecting the dominant shareholder to the summary jurisdiction of the referee in the absence of at least some evidence of manipulation. The referee made no finding from which it could be inferred that it would be inequitable not to subject Gill to the bankruptcy court's summary jurisdiction. Indeed, the evidence before us is consistent with a good faith effort on the part of Gill to salvage the corporation and work out some sort of settlement with the corpora-

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[17] See, e.g., South Falls Corp. v. Rochelle (5 Cir. 1964) 329 F. 2d 611 (the evidence portrays "a picture of discriminate application of funds to the advantage of insiders."); In re Gillespie Tire Co. (W. D. S. C. 1942) 54 F. Supp. 336. On the other hand, this court has refused to pierce the corporate veil where something equivalent to fraud was not shown. See Maule Industries, Inc. v. Gerstel (5 Cir. 1956) 232 F. 2d 294.

tion's unsecured creditors.[18] Moreover, although Gill may have been in a position to exercise control over the corporation under the terms of the voting trust when the allegedly voidable transfers were made, he had clearly exercised no control at that time.

The case of In re Gillespie Tire Co., (W. D. S. C. 1942) 54 F. Supp. 336, on which the trustee relies heavily, is factually distinguishable from the case at bar. There, the owner of 98% of the bankrupt's capital stock had dealt with the corporation's assets to the detriment of its largest unsecured creditor, primarily by making transfers to her personal account. On the facts, the court was convinced that "in these transactions a legal fraud was committed against the interests of certain creditors for which Mrs. Gillespie should be liable." 54 F. Supp. at 337. In the case at bar, the evidence in the record does not convince us that Gill's control of the corporation was exercised in such a manner that he should be treated as the bankrupt and subjected to the summary jurisdiction of the bankruptcy referee for all purposes.

Holding

In view of our disposition of the consent issue, the judgment of the District Court and the order of the referee are reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

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[18] The fact, standing alone, that under the proposed arrangement, Gill's secured claims were to be paid in full while those of some unsecured creditors would not be fully satisfied, does not constitute evidence from which an improper purpose might be inferred. The Bankruptcy Act itself grants secured creditors a preferred position. Furthermore, under the arrangement proposal, the unsecured creditors could elect to have their claims fully satisfied out of the net distributable earnings of the company over a period of time.

We note in this connection that the referee expressly stated in his decision that he had not inquired into the question of whether Gill's position with respect to the allegedly voidable transfers was adverse, substantial, and asserted in good faith or whether it was merely colorable. This line of inquiry is still open, and, if, upon hearing, the referee determines that Gill's claim is colorable only, it is possible that summary jurisdiction can be sustained. We intimate no opinion on this question.

REVERSED AND REMANDED.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 653.

NEW YORK STOCK EXCHANGE,
Petitioner,

v.

WILLIAM H. LEGATE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION OF NEW YORK STOCK EXCHANGE FOR A WRIT OF CERTIORARI.

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1 Remington on Bankruptcy (5th ed.), §§ 22, 35 17

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Supreme Court of the United States

OCTOBER TERM, 1964.

No. 633.

NEW YORK STOCK EXCHANGE,
Petitioner,

v.

WILLIAM H. LEGATE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION OF NEW YORK STOCK EXCHANGE FOR A WRIT OF CERTIORARI.

Statement of the Case.

On September 9, 1960, the stock-brokerage firm of du-Pont, Homsey & Co. (hereinafter called "firm") and also the senior and managing general partner thereof, Anton E. Homsey (hereinafter called "Homsey"), were suspended from the New York Stock Exchange (hereinafter called "Exchange"); and on September 17, 1960, an equity receiver was appointed (R. 82) in a civil action brought on that date by the Securities & Exchange Commission (R. 259).

Some time after the receivership this respondent learned (*inter alia*) the following facts: that during the career of

the firm as a member of the Exchange it had committed many violations of the Securities & Exchange Act (hereinafter called "Act") and of the rules and regulations adopted pursuant thereto, as well as the rules of the Exchange; that for a number of those violations the Exchange had imposed warnings and actual fines, and had also imposed upon the firm in 1955 a reduced status involving more burdensome capital requirements and a lower ratio between capital and aggregate indebtedness (R. 119); that under date of November 12, 1958, the Exchange issued a warning regarding the firm's very large holdings of speculative shares which had but a limited market (Ex. 58, R. 151); and that a report by an Exchange examiner (Beliakow) charging the firm with a number of violations was discussed by that examiner with Homsey early in February, 1959 (R. 147).

The Exchange, having assumed under the Act the duty of supervision over its members and being engaged since 1956 in carrying on a massive advertising program urging the public to place trust and confidence in its members (R. 135), submitted a proposal in the receivership proceedings shortly after the commencement thereof (R. 12). Avowedly in accordance with that proposal, there was filed on November 3, 1960 (R. 11), the "Receiver's Plan for Partial Liquidation" (hereinafter called "PLAN"), together with a petition for approval thereof. On the same day an order of notice "to all interested parties" was issued on such petition (R. 4 and 268). On November 15, 1960, the return day of such order of notice, after hearing "statements by the Receiver and by counsel for various interested parties," including Marcien Jenckes, Esquire, counsel for the Exchange, the District Court entered an order approving the PLAN and authorizing the receiver to carry out its provi-

sions "provided the obligations of the New York Stock Exchange are fulfilled according to its terms" (R. 37-38).

Among such obligations of the Exchange was its obligation to purchase the claims of certain "special claimants" (R. 12) after said claimants had severally executed and delivered the instruments entitled "Consent, Waiver and Subordination," prescribed by the PLAN, whereby each such special claimant "for himself, his heirs, personal representatives, successors and assigns, . . . irrevocably . . . waives any right to share in any part of the assets now in or hereafter coming into the hands of the receiver or to receive any share thereof unless and until all customers and creditors of the defendant duPont, Homsey & Company have been paid in full . . ." (R. 33 and 34).

As appears by the PLAN, the reason for such subordination was "Because of the doubt as to the firm's solvency and the consequent possibility that the appointment of a receiver constituted an act of bankruptcy," and because the subordination of those claims would render the firm solvent, as shown by the statement of assets and liabilities annexed to the PLAN (R. 22-26), and would thus remove the danger of a creditors' petition in bankruptcy against the firm (R. 13).

Another of the obligations of the Exchange under the PLAN was the obligation to pay all "costs and expenses of administration of the receivership, including allowances to Court appointed attorneys and auditors," if the receivership assets "remaining after the payment of priorities and customers' and creditors' claims . . . are not sufficient therefor" (R. 19).

On December 28, 1960, the Exchange filed in the receivership a statement (R. 84) acknowledging compliance with conditions (b) (c) (d) (e) (f) and (g) of paragraph 7 of the PLAN and waiving compliance with condition (a) thereof, whereupon the PLAN became effective (R. 13).

The subordinated special claims referred to in the PLAN were thereafter purchased by the Exchange, the assignments thereof being taken by it in the name of Marcien Jenckes, Esq., its attorney as its "nominee," pursuant to a form of assignment prescribed by the PLAN (R. 31-33), which expressly referred to the previous execution and delivery of said forms of "Consent, Waiver and Subordination" (R. 32).

In his proof of claim, seasonably filed in the receivership proceedings (R. 38), the respondent (hereinafter called Legate) (1) claimed rescission of an agreement for limited partnership in the firm in connection wherewith $81,162.50 in cash and securities was obtained from him on February 28, 1959 (R. 113), and (2) claimed also a credit balance of $29,735.50 plus certain securities "long" on his customer account with the firm (R. 38-42). The rescission sought in his proof of claim was on the ground that he was induced to enter into the transaction by misrepresentations and by concealment of material facts as to which he did not learn the truth until after the receivership (R. 40).

After the expiration of the four-month period from the date of the receivership and the consequent lapse of the time for the filing of a creditors' petition in bankruptcy by reason thereof, Mr. Jenckes, the attorney for the Exchange and its "nominee," petitioned that the subordinated claims which the Exchange had purchased be allowed as "general creditor" claims (R. 54-56). Legate duly filed objections to that petition (R. 88).

On July 18, 1961, after learning that said Jenckes had been appointed attorney for the receiver, Legate filed a motion to disqualify him, on the ground that there were conflicts of interests between (*a*) the interests of the Exchange, represented by Mr. Jenckes, as its attorney and "nominee," and (*b*) the interests of the receiv-

ership to enforce against the Exchange full performance of the obligations assumed by it under the PLAN, as well as its liability for failure to perform its duties in respect to the firm, and the question of priority, in respect of the alleged excess of assets, as between Legate and the subordinated claims purchased by the Exchange (R. 86-88).

On July 24, 1961, the District Court denied that motion for disqualification (R. 7), in spite of said apparent conflicts of interests, thus leaving the Exchange, through its attorney and "nominee," in effective control over the receivership. Thereafter Mr. Jenckes (being clothed with the mantle of counsel for the receiver) urged, under that cloak, the contentions and interests of the Exchange.

In respect to this use of the name of the receiver for the benefit of the interests of the Exchange, the Court of Appeals says (R. 323):

> "Indeed, although the receiver exists as a separate party, and will have certain personal claims, *the real parties in interest and in competition with each other in the present proceedings are appellant and the Exchange.* This fact is not concealed by the circumstance that the Exchange has assigned its interests to an attorney who, it so happens, is representing the receiver on this appeal. It is to be noted that six pages of the 'receiver's' brief are devoted to arguing that the petition which appellant sought to have heard against the Exchange was properly dismissed for lack of jurisdiction. (Footnote 5) As the Exchange's 'nominee' or alter ego he filed a claim in the general receivership proceedings, and is and was directly financially interested in various aspects, particularly in the receiver's claim against the appellant for failure to disclose Homsey's misdoings. *In fact in the Receiver's Counterclaim which he signed as counsel for the receiver,* it

> was asserted, inter alia, that appellant's non disclosure was a violation of his 'duty to . . . the Exchange.' While, perhaps, this allegation was only a makeweight for the receiver's claim on behalf of the creditors as a whole, it is an apt reminder of who those creditors really are." (Emphasis supplied.)

After waiting more than three months for a move to be made by Mr. Jenckes on behalf of the interests of the receivership against the Exchange, Legate filed, on October 27, 1961, his petition against the Exchange (R. 58-65), which, as duly amended (R. 66), alleged, in substance (*inter alia*), that the Exchange, having registered under the Act, failed and neglected to perform its duties thereunder with respect to the firm; that there was an excess of receivership assets over and above all claims of customers and creditors of the firm as well as all costs and expenses of the receivership (R. 67), except only (*a*) those of Legate and (*b*) those of the Exchange on the subordinated claims purchased by it under the PLAN (R. 67). Legate's petition as amended further averred that "the receiver was in essence and equity merely a stakeholder of said excess of assets," and that in equity Legate was "entitled to the benefit of any and all defenses and counterclaims" of the receiver against the Exchange (R. 67). Legate's petition prayed, *inter alia*, that, as to the alleged excess of assets, it be adjudged that he was entitled to priority over the subordinated claims purchased by the Exchange; and that, to the extent that said surplus of assets of the receivership should not be sufficient to satisfy his claims, the Exchange be ordered to pay an amount equal to such deficit in the receivership assets (R. 64).

Mr. Jenckes filed a motion, as attorney for the receiver, to dismiss said petition, though the relief sought thereby

was against his client, the Exchange. The grounds of this motion to dismiss were lack of jurisdiction over the Exchange, and also that Legate's said claim based on rescission was not entitled to priority over the subordinated claims purchased by the Exchange (R. 65, 66).

On May 1, 1962, the District Court allowed said motion filed in the name of the receiver to dismiss the petition brought against the Exchange (R. 72). An appeal therefrom by Legate was met by a motion in the Court of Appeals, again filed in the name of the receiver, to dismiss for lack of finality (308 F. 2d 228). When Legate petitioned this Court for certiorari to review the allowance by the Court of Appeals of that motion to dismiss, the brief filed in this Court in opposition to certiorari was also in the name of the receiver (372 U.S. 912). However, the Court of Appeals has now reversed the decision rendered by the District Court on May 1, 1962, on the motion to dismiss Legate's petition of October 27, 1961, against the Exchange and has remanded the case for "further proceedings" (334 F. 2d 704). It is this order reversing and remanding that the Exchange seeks to have this Court review by its petition for certiorari.

Reasons why the Petition of the Exchange for a Writ of Certiorari should be Denied.

I. The order of the Court of Appeals which the Exchange seeks to have reviewed by this Court is not a final judgment or decree.

II. The petition of the Exchange fails to comply with the rules of this Court pertaining to a petition for a writ of certiorari by including in its petition alleged copies of two letters (Appendices D and D1) which are not in the

record certified to this Court by the Clerk of the Court of Appeals, which were no part of the record before that Court, which were not offered in evidence, and as to which Legate has had no opportunity to object or to comment as to the admissibility, competence or legal effect thereof.

III. By its various and numerous activities and appearances in the receivership proceedings and by the presentation of its purchased subordinated claims for allowance as general-creditor claims, the Exchange became subject to the Court's jurisdiction on Legate's petition to enforce its obligations to the receivership under the PLAN and its liability under the Act.

IV. The decisions relied upon by the Exchange in its petition for certiorari are readily distinguishable.

Argument.

I. BY ITS PETITION FOR CERTIORARI THE EXCHANGE SEEKS REVIEW OF AN ORDER WHICH IS NOT A FINAL JUDGMENT OR DECREE.

By its recent decision the Court of Appeals reversed the District Court order of May 1, 1962, dismissing Legate's petition of October 27, 1961, for relief against the Exchange, on the motion to dismiss filed in the name of the receiver; and remanded that petition to the District Court for "further proceedings." That such order of the Court of Appeals is not a final judgment or decree has been uniformly held by this Court in a long line of cases, dating back to the Judiciary Act of 1789.

In *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 1 S. Ct. 15 (1882), the defendant's demurrer to the complaint on the ground of lack of jurisdiction was sustained. Upon appeal the Court of Appeals reversed and remanded the case for fur-

ther proceedings. From that reversal the case was brought to the United States Supreme Court by writ of error; and there a motion to dismiss was filed on the ground that the judgment sought to be reviewed "is not a final judgment." In granting the motion to dismiss, this Court, speaking by Chief Justice Waite in a unanimous opinion, says at pages 3-4:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case . . . [Cases cited.] . . . *If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error.* [*Cases cited.*] . . . *The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit.*" (Emphasis supplied.)

In *Forsyth* v. *Hammond*, 166 U.S. 506, 17 S. Ct. 665 (1897), this Court says at page 514:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. *Chicago & Northwestern Railway* v. *Osborne*, 146 U. S. 354."

In *Collins* v. *Miller*, 252 U.S. 364, 40 S. Ct. 347 (1920), this Court says at page 370, in a unanimous decision by Mr. Justice Brandeis citing a number of decisions:

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. [Cases cited.] And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

In *Slaker* v. *O'Connor*, 278 U.S. 188, 49 S. Ct. 158 (1929), where, as in the case at bar, the District Court dismissed a petition for want of jurisdiction and the Court of Appeals reversed and remanded the cause for further proceedings (22 F. 2d 147), this Court dismissed an appeal from the reversal and remand order of the Circuit Court; and even awarded the appellee damages and also costs by way of penalty. Speaking by Mr. Justice McReynolds in a unanimous opinion, this Court said (at p. 189): "Manifestly, the decree below is not final."

In *Catlin* v. *United States*, 324 U.S. 229, 65 S. Ct. 631 (1945), this Court says:

> At page 233: "*A 'final decision' generally is one which ends the litigation on the merits* and leaves nothing for the court to do but execute the judgment. . . ."
>
> At pages 233-234: "The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. . . . 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limita-

tion. One is elimination of delays caused by interlocutory appeals. . . ."

At page 236: "*But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable.* Cf. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. See also *Dieckmann* v. *United States*, 88 F. 2d 902." (Emphasis supplied.)

It is therefore respectfully submitted that the order of the Court of Appeals reversing the order entered by the district judge dismissing Legate's petition of October 27, 1961, for relief against the Exchange, on the motion to dismiss filed in the name of the receiver and remanding the case for further proceedings, is not a final judgment or decree; and that the Exchange petition for certiorari should therefore be denied.

II. The Exchange Violated the Rules of This Court by Including in its Petition for Certiorari Two Letters which were Not Part of the Record Certified by the Clerk of the Court of Appeals.

Rule 21(1) of the rules of this Court expressly sets forth the long-settled policy of this Court that a petition for certiorari is to be determined only upon the record which was before the Court of Appeals. Contrary to this rule and settled policy, the Exchange includes in its petition two purported copies of letters (Appendices D and D1) which are not in the record certified by the clerk of the Court of Appeals. The Exchange petition does not (and cannot) claim that those letters were offered or admitted in evidence; and it is plain that Legate has had no opportunity

to object to their admissibility and competence or to be heard on the legal effect thereof.

It is therefore respectfully submitted that this attempt on the part of the Exchange to circumvent the rule and policy of this Court should not be rewarded by granting certiorari.

III. By its Various and Numerous Activities and Appearances in the Receivership Proceedings and by the Presentation of its Purchased Subordinated Claims for Allowance as General-Creditor Claims, the Exchange Became Subject to the Court's Jurisdiction on Legate's Petition to Enforce its Obligations to the Receivership under the Plan and its Liability under the Act.

In his proof of claim (referred to in his petition of October 27, 1961), Legate claimed creditor status for claims aggregating in excess of $110,000; and the allegations of his petition averred that the only other outstanding claim in the receivership was that of the Exchange on its purchased subordinated claims. In view of this situation the Court of Appeals rightly says: "The real parties in interest and in competition with each other were Legate and the Exchange" (R. 323).

The counsel for the Exchange and also its "nominee" having been appointed as counsel for the receiver, in spite of Legate's objections to such appointment on the ground of conflict between the interests of the receivership and those of the Exchange, no objections, defenses or counterclaims to the Exchange's application for allowance of its subordinated claims had been filed in behalf of the (so to speak) captive receivership, although more than three months had elapsed by October 27, 1961, the date when Legate's petition was filed.

Legate's petition sought enforcement against the Exchange of its obligations under the PLAN to pay into the receivership the amount of any deficit in receivership assets required for the satisfaction of creditor-status claims (R. 58); and also the liability of the Exchange to the receivership by reason of its alleged failure and neglect to perform its duty under the Act.

The various and numerous activities and appearances of the Exchange in the receivership proceedings are shown by the record. It submitted in those proceedings the proposal upon which the PLAN was based (R. 11). It appeared by counsel at the hearing of the petition for approval of the PLAN and expressly assumed "obligations" thereunder, as the order aproving the PLAN states (R. 38). The Court entered orders against it (R. 84 and 85). It filed an answer in those proceedings (R. 75); and on April 12, 20 and 25, 1961, respectively, the Exchange filed motions therein (R. 75); and on July 5, 1961, application was filed for the allowance of the subordinated claims which it had purchased under the PLAN. It seems clear that, by these various appearances and activities in the proceedings, the Exchange had become subject to the jurisdiction of the Court.

In *Wabash Western Railway* v. *Brow*, 164 U.S. 271, 17 S. Ct. 126, this Court said, at page 278:

> "An appearance which waives the objection of jurisdiction over the person . . . may be effected in many ways, and *sometimes may result from the act of the defendant even when not in fact intended.*" (Emphasis supplied.)

In *Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U.S. 286, 27 S. Ct. 285, Mr. Justice Holmes, speaking for the Court, said, at page 290:

"There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. . . . there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit."

In *Alexander* v. *Hillman*, 296 U.S. 222, 56 S. Ct. 204, the Court of Appeals had dismissed a counterclaim petition filed against residents of Pennsylvania who had presented proofs of claim in an equity receivership proceeding pending in the United States District Court of West Virginia. The dismissal of the counterclaim petition by the Court of Appeals was on the same grounds as those urged herein by the Exchange, namely that no formal process had been issued against those Pennsylvania residents, that they had not been served with process, that they had no places of business in West Virginia, and that they were not subject to the jurisdiction of the Court. Though those Pennsylvania residents had done nothing more in that receivership proceeding than to present proofs of claim, this Court reversed the Court of Appeals and held that those Pennsylvania residents had thereby submitted to the jurisdiction of the receivership Court, saying, in a unanimous opinion:

At pages 238-239: "Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims."

At page 239: "*Treating their established forms as flexible, courts of equity may suit proceedings and*

remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them. See Story, Equity Jurisprudence, 14th ed., § 28." (Emphasis supplied.)

At page 241: "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 [Judicial Code, 28 U.S.C. § 112] to the contrary notwithstanding."

At page 243: "*Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere.*

"It is clear that, under the circumstances disclosed, the restrictions laid by the Circuit Court of Appeals upon the receivership court are not consistent with that freedom as to procedure that necessarily belongs to courts of equity administering receiverships. [Cases cited.]" (Emphasis supplied.)

In the case at bar the Exchange had, by its various and numerous activities in the receivership proceedings referred to above, done much more than merely present its claim for allowance; and the long-established principle of equity referred to in Story on Equity Jurisprudence and set forth in the *Alexander* case was even more applicable, namely that:

> "courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them." (296 U.S. 239.)

The receivership in the *Alexander* case was not an instance of a captive receivership; and the counterclaim petition against the Pennsylvania residents was therefore promptly filed by the receiver. In the case at bar, however, all creditor-status claims having been provided for from receivership assets, the situation was such that the receiver was a mere "stakeholder" as alleged in the petition (R. 67). No move against the Exchange was made in behalf of the receivership by Mr. Jenckes, who, though representing the Exchange, had nevertheless been appointed counsel for the receiver over Legate's objections. Legate's petition against the Exchange, filed after a lapse of three months, without any action having been taken against it in behalf of the receivership, sought, in substance, "appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights" against the Exchange, to use the above-quoted apt language of the *Alexander* case.

Legate's petition shows on its face that the matters raised thereby involved the receivership estate and the assets thereof, which properly included, not only the excess of receivership assets averred to be on hand, but also the obligations of the Exchange under the PLAN and its liability under the Act.

It is therefore respectfully submitted that the Court of Appeals properly vacated the judgment of the District Court and remanded Legate's petition for "further proceedings"; and that the Exchange petition for certiorari should not be granted.

IV. THE DECISIONS RELIED UPON BY THE EXCHANGE IN ITS PETITION FOR CERTIORARI ARE READILY DISTINGUISHABLE.

The Exchange petition for certiorari cites a number of cases on the question of what constitutes "doing business."

Those cases have no application to the issue whether the active participation of the Exchange in the receivership proceedings and the filing of the petition for allowance of its subordinated claims constituted submission to the jurisdiction of the Court.

Nor do the bankruptcy cases cited in the Exchange petition have any bearing. The equity jurisdiction of Bankruptcy Courts is limited, not plenary.

1 Remington on Bankruptcy (5th ed.), §§ 22 and 35.

Sylvan Beach, Inc., v. *Koch*, 140 F. 2d 852, 861 (C.C.A. 8th, 1944).

Evarts v. *Eloy Gin Corp.*, 204 F. 2d 712 (C.A. 9th, 1953); cert. den. 346 U.S. 876, 74 S. Ct. 129.

The summary jurisdiction cases referred to in the Exchange petition are not relevant. In such cases there are no formal pleadings; they are frequently decided *ex parte*, on mere affidavits, and without a full hearing.

Central Republic Bank & Trust Co. v. *Caldwell*, 58 F. 2d 721 (C.C.A. 8th, 1932), at pp. 731 and 732.

It therefore seems clear that such cases have no application to the instant case, where the remand order of the Court of Appeals for "further proceedings" assures the Exchange a full hearing by a Court clothed with plenary equity powers.

V. Conclusion.

It is therefore respectfully submitted that the petition of the Exchange for a writ of certiorari should be denied.

Respectfully submitted,

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Dated at Boston, Massachusetts, November 25, 1964.